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NO. 11508

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

OCTOBER TERM, A. D., 1955

IN THE MATTER OF
ROBERT L. KNETZER, BANKRUPT

WILLIAM C. DUNHAM, as Trustee of the Estate of Robert L. Knetzer, Bankrupt,

Appellant,

vs.

ROBERT W. JAFFKE,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

STATEMENT PURSUANT TO RULE 10(b) OF THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Page of Record

1 This case was commenced on December 1, 1952 by a petition filed by Robert W. Jaffke for the reclamation of certain funds allegedly belonging to the Petitioner, and in the possession of William C. Dunham, as Trustee of the Estate of Robert L. Knetzer, Bankrupt. The suit was originally begun by Robert W. Jaffke as Petitioner William C. Dunham, as Trustee of the Estate of Robert L. Knetzer, Bankrupt, and the said Robert L. Knetzer were parties defendant and respondents in said petition. Subsequent thereto, on the hearing of said cause on October 15, 1954, the Defendant-Respondent William C. Dunham suggested the death of Robert L. Knetzer in the record of said hearing, and the fact that Robert L. Knetzer was survived by Violet Knetzer, his widow, and two minor

children, namely John Robert Knetzer and Kathleen Mary Knetzer.

The petition for reclamation was filed on December 1, 1952, the answer and affirmative defenses of William C. Dunham were filed March 16, 1953, and a motion to make more definite first affirmative defense and reply to other affirmative defenses was filed April 1, 1953 by the petitioner. This motion was overruled by the Honorable Charles G. Briggle on September 24, 1954.

Thereafter, an affidavit for change of venue and an application to disqualify judge, respectively, were filed by the petitioner on December 24, 1953.

The Honorable Charles G. Briggle assigned this case to Judge J. LeRoy Adair and the evidence on said petition was taken before him on the 14th and 15th days of October, 1954.

On April 15, 1955, Findings of Fact, Conclusions of Law and Judgment Order were entered by Judge J. LeRoy Adair, wherein he ordered that the petitioner recover from
2 the Respondent, William C. Dunham, in his official capacity as Trustee in Bankruptcy, the sum of Twenty Seven Thousand Four Hundred Dollars ($27,400.00).

William C. Dunham, the Defendant-Respondent, filed a notice of appeal from said order in the office of the Clerk of the U.S. District Court for the Southern District of Illinois, Southern Division, on April 21, 1955.

The case was heard and determined by the Court as a Referee sitting in Bankruptcy, and there was no determination by a jury.

WILLIAM C. DUNHAM, Trustee of the Estate of Robert L. Knetzer, Bankrupt
Respondent-Appellant
By /s/ G. W. Horsley
G. W. Horsley
and /s/ L. H. Lenz
L. H. Lenz
408 E. Adams Street
Springfield, Illinois
Attorneys

3 Pleas in the District Court of the United States of America within and for the Southern Division of the Southern District of Illinois, held in the City of Springfield, in said Division and District, before the Honorable Charles G. Briggle, Judge of said Court, on Monday the second day of June, in the year of our Lord one thousand nine hundred and fifty-two, and of the Independence of the United States of America, the one hundred and seventy-sixth year.

PRESENT:

Charles G. Briggle, District Judge
Robert Grant, United States Marshall
Howard L. Doyle, United States Attorney
G. W. Schwaner, Clerk

ATTEST:

G. W. Schwaner, Clerk

PETITION OF ROBERT W. JAFFKE

4 (Filed on December 1, 1952.)

5 The petition of Robert W. Jaffke residing at No. 3540 Herford Street in the City of St. Louis, in the State of Missouri, by occupation a Real Estate Broker, respectfully represents:

1. That on the 5th day of October, 1948, there was filed in the office of the Clerk of the United States District Court for the Southern District of Illinois, Southern Division, a certain petition, in and by which petition the petitioner prayed that one Robert L. Knetzer, of Edwardsville, Illinois, be adjudged by the Court to be a bankrupt within the purview of the Acts of Congress of the United States of America relating to bankruptcy; that said Clerk then and there designated on the docket of said Court said cause as No. 11789.

2. That on the 21st day of October, 1948, said Court heard said petition and upon such hearing ordered and adjudged the said Robert L. Knetzer, a bankrupt, within the purview of said Acts of Bankruptcy, and then and

there the said Court in said cause appointed one William C. Dunham, of the City of East St. Louis, in the State of Illinois, trustee of the estate of the above named bankrupt.

3. That the said William C. Dunham, then and there accepted such appointment and on the 15th day of December, 1948, presented to said Court for approval his bond as such Trustee and the Court then and there approved such bond, and such bond so approved by the Court was at once filed in the office of the Clerk of said Court, and the said William C. Dunham thereupon became the duly appointed, qualified and acting Trustee of the estate of
6 said bankrupt, and from thence until now continued to act as such Trustee and is now so acting as such Trustee.

4. That on or about the 6th day of December, 1950, said Robert L. Knetzer requested this petitioner to meet with him, the said Robert L. Knetzer, at the Sheraton Hotel in the City of St. Louis, in the State of Missouri, and in compliance with such request this Petitioner and the said Robert L. Knetzer at said time met at said Sheraton Hotel.

5. That at such meeting in said Sheraton Hotel, the said Robert L. Knetzer then and there stated to petitioner that he, the said Robert L. Knetzer, was then and there ready and able to organize a certain corporation under the name, style and description of The Bison Construction and Mining Corporation, under the laws of the State of Montana for the purpose of constructing homes in a housing project near the air base at or near to Great Falls, Montana, and that he, the said Robert L. Knetzer, had connections with various business concerns that would enable him to erect residential property at a price cheaper than could be done by any other builder or contractor, and that he, Robert L. Knetzer, was then working on a deal whereby he could obtain from the Reconstruction Finance Corporation, a United States Governmental Agency, funds with which to pay for the construction or erection of such homes; that in order to be able to initiate such business, he, the said Robert L. Knetzer, would need to borrow a sum of money from petitioner, and that he, Robert L. Knetzer, would need such money but a short time and

within less than a year he, Robert L. Knetzer, would be able to repay petitioner and all the other creditors of him, the said Robert L. Knetzer, and would have plenty of profits left in which petitioner would share.

6. That the said Robert L. Knetzer made the statements set forth in paragraph 5 of this complaint to the petitioner, and the said Robert L. Knetzer, at the time and place aforesaid, contriving to wrong and defraud petitioner, falsely and fraudulently represented that such statements so made by him as aforesaid were true.

7. That said Robert L. Knetzer then and there made such representations for the purpose of inducing petitioner to advance and turn over to him, the said Robert
7 L. Knetzer, the sum of $47,980.00 for the purposes aforesaid.

8. That petitioner believed such representations so made by the said Robert L. Knetzer and relied upon the same, and so believing and relying upon such representations, petitioner did deliver and pay over to the said Robert L. Knetzer the said sum of $47,980.00 for the purposes aforesaid.

9. That petitioner was deceived by said statements and representations so made by said Robert L. Knetzer, and was induced thereby to pay over to the said Robert L. Knetzer at the time and in the manner hereinbefore set forth, the said sum of $47,980.00.

10. That the said Robert L. Knetzer at the time of making such representations and receiving such money, knew that such representations were false.

11. That by reason of the said Robert L. Knetzer so making such representations and by reason of petitioner so paying to the said Robert L. Knetzer the said sum of money in the manner hereinbefore set forth, said sum of $47,980.00 so received by the said Robert L. Knetzer, then and there became impressed with a trust for the said uses and purposes for which it was so paid over and so received, and the said Robert L. Knetzer, then and there had no right or authority to use said money for any other purpose.

12. That the said Robert L. Knetzer wrongfully, unlawfully and fraudulently failed and refused to use any

part of said sum of money for any purpose for which said money was paid over by petitioner to the said Robert L. Knetzer.

13. That from the time of so advancing such money by petitioner to the said Robert L. Knetzer, until on or about the 1st day of August, 1952, petitioner believed that said Robert L. Knetzer was using said money for the purpose for which it was turned over to him, the said Robert L. Knetzer.

14. That on or about the 1st day of August, 1952, the said Robert L. Knetzer informed petitioner that he, the said Robert L. Knetzer, had, during the period of December 7, 1950, to November 1, 1951, paid the sum of $36,000.00 from the above named sum of $47,980.00 to William C. Dunham, Trustee in Bankruptcy of the estate of Robert L. Knetzer, a bankrupt, for the purpose of remaining out of jail.

8 15. That the said Robert L. Knetzer then and there had no right or authority to use said money, or any part thereof, to pay over to the said William C. Dunham, as such Trustee, and the said William C. Dunham, as such Trustee, then and there had no right or authority to receive such money or any part thereof.

16. That he, the said William B. Dunham, as such Trustee, then and there, at the time of receiving such money, well knew that the said Robert L. Knetzer was and had been, since the 15th day of December, 1948, a bankrupt, and said Trustee should not have received such money so paid to him without learning what right, title and interest, if any, the said Robert L. Knetzer had in and to said money, and if by the exercise of reasonable diligence said Trustee had made inquiry, he would have learned that he had no right to receive such money or any part thereof.

17. That notwithstanding his duty in that behalf, said Trustee received such sum of $36,000.00, petitioner is informed, and still wrongfully and unlawfully holds the same, and such sum so paid to him should be paid over by him, the said William C. Dunham, to the petitioner herein as a credit upon the sum owing by said Robert L. Knetzer to petitioner; that it would be inequitable for said Trustee to pay said sum of $36,000.00 or any part thereof to the creditors

of the said Robert L. Knetzer, bankrupt, or to pay out of said sum any part of the costs of such bankruptcy proceeding, and the said Trustee should, by order of this Court, be enjoined from so paying out of said sum of $36,000.00 any sums to the creditors of said Robert L. Knetzer, bankrupt, or any costs of such bankruptcy proceedings.

18. That upon learning that representations so made by the said Robert L. Knetzer were false as hereinbefore alleged, petitioner made demand upon said Robert L. Knetzer to return to him, the petitioner, the sum of money so turned over by him, the petitioner, to him, the said Robert L. Knetzer, and the said Robert L. Knetzer has at all times since said demand was made, refused and neglected to pay over such sum, or any part thereof, in compliance with such demand.

19. That the said Robert L. Knetzer should account for and pay over to petitioner the said sum of $47,980.00.

9 20. The petitioner hereby makes parties defendant to this petition Robert L. Knetzer and Robert L. Knetzer, bankrupt, in cause No. 11789, and William C. Dunham, as Trustee in Bankruptcy in the estate of Robert L. Knetzer, bankrupt, cause No. 11789, and prays that summons may issue against each of them.

WHEREFORE, petitioner demands:

1. That petitioner have judgment against the said Robert L. Knetzer for the sum of $47,980.00.

2. That petitioner have judgment against Robert L. Knetzer, bankrupt, ordering and directing the said Robert L. Knetzer, as such bankrupt, to return to petitioner said sum of $47,980.00.

3. That petitioner have judgment against William C. Dunham, as Trustee of the estate of Robert L. Knetzer, a bankrupt, ordering and directing said Trustee to account for and pay over the sum of $36,000.00 to petitioner to be applied by said petitioner upon said sum of $47,980.00 owing by the said Robert L. Knetzer to petitioner.

4. That said William C. Dunham, as Trustee of the estate of Robert L. Knetzer, be enjoined from paying said sum of $36,000.00, or any part thereof, to the creditors of

the said Robert L. Knetzer, bankrupt, and from paying out of said sum any costs of said bankruptcy proceeding.

5. That petitioner have such other and further relief as is just.

Robert W. Jaffke
3540 Herford Street
Zone 9, St. Louis, Missouri
Petitioner

/s/ Roscoe Bonjean
Roscoe Bonjean
501 Myers Building
Springfield, Illinois
and
/s/ S. S. DuHamel
S. S. DuHamel
414 Illinois Building
Springfield, Illinois
Attorneys for Petitioner

STATE OF MISSOURI }
COUNTY OF ST. LOUIS } SS.

10 Robert W. Jaffke, being duly sworn, upon his oath states that he is the petitioner in the foregoing petition and that he has read said petition, and states that the matters and things therein stated are true.

Robert W. Jaffke

Subscribed and sworn to before me, a Notary Public in and for said County of St. Louis in the State of Missouri, this 6th day of November, 1952.

And I hereby certify that I have full power and authority under the laws of the State of Missouri to administer oaths.

Dorothy Allaway,
(Seal) Notary Public.

My Commission expires July 18, 1954.

Rec. a copy of the foregoing this 1st day of December, 1952.

G. W. Horsley, Atty. for
William C. Dunham, Trustee.

Indorsed, Filed
Dec. 1, 1952,
G. W. Schwaner, Clerk

ANSWER OF WILLIAM C. DUNHAM TO PETITION TO RECOVER FUNDS FROM TRUSTEE FILED BY ROBERT W. JAFFKE

11 (Filed on March 16, 1953.)

12 Now comes WILLIAM C. DUNHAM, Trustee in Bankruptcy, of the bankrupt estate of Robert L. Knetzer and for answer to the petition of Robert W. Jaffke filed December 1, 1952, says:

1. He admits each and every one of the allegations of paragraph 1.

2. He admits each and every one of the allegations of paragraph 2.

3. He admits each and every one of the allegations of paragraph 3.

4. He is not sufficiently informed to neither admit nor deny the allegations of paragraph 4 and therefore prays strict proof thereof.

5. He is not sufficiently informed to neither admit nor deny the allegations of paragraph 5 and therefore prays strict proof thereof.

6. He is not sufficiently informed to neither admit nor deny the allegations of paragraph 6 and therefore prays strict proof thereof.

7. He is not sufficiently informed to neither admit nor deny the allegations of paragraph 7 and therefore prays strict proof thereof.

8. He denies each and every one of the allegations of paragraph 8.

9. He denies each and every one of the allegations of paragraph 9.

10. He is not sufficiently informed to neither admit nor deny the allegations of paragraph 10 and therefore prays strict proof thereof.

11. He denies each and every one of the allegations of paragraph 11.

12. He denies each and every one of the allegations of paragraph 12.

13. He denies each and every one of the allegations of paragraph 13.

14. He denies each and every one of the allegations of paragraph 14.

15. He denies each and every one of the allegations of paragraph 15.

16. He denies each and every one of the allegations of paragraph 16.

17. He denies each and every one of the allegations of paragraph 17.

18. He is not sufficiently informed to neither admit nor deny the allegations of paragraph 18 and therefore prays strict proof thereof.

19. He is not sufficiently informed to neither admit nor deny the allegations of paragraph 19 and therefore prays strict proof thereof.

13 He further denies that the petitioner, Robert W. Jaffke, is entitled to any relief against him as prayed for in said petition and he further denies more specifically that said petitioner is entitled to judgment against him in the sum of $36,000.00 or in any sum of money whatsoever

and he further denies that said petitioner is entitled to any injunctive relief as prayed for in said petition and further answering the petition of the said Robert W. Jaffke, your Trustee says:

FIRST AFFIRMATIVE DEFENSE

1. That the said Robert W. Jaffke did prior to October 5, 1948 give to the said Robert L. Knetzer a large sum of money in connection with certain business ventures in which the said Robert W. Jaffke hoped to make a profit and that the said Robert W. Jaffke has filed in this Bankruptcy Court a claim in the amount of $11,300.00, claiming that the said Robert L. Knetzer was indebted to the said Robert W. Jaffke in the sum of $11,300.00; that the said Robert W. Jaffke had ample notice of the nature and conduct of the business of the said Robert L. Knetzer and had ample knowledge of his fraudulent schemes and practices in connection with the operation of his business; that at the time of the alleged payment by the said Robert W. Jaffke to the said Robert L. Knetzer between the times mentioned in said petition, the said Robert W. Jaffke had notice of the turnover order which had been entered against the said Robert L. Knetzer to make payment to your Trustee of certain sums of money of, to-wit, $250,000.00.

2. That if the said Robert W. Jaffke did loan certain moneys to the said Robert L. Knetzer, your Trustee verily believes that it was for the purpose of participating in certain concealed assets which the said Robert W. Jaffke thought that the said Robert L. Knetzer had in his possession or within his control and your Trustee further verily believes that the said Robert W. Jaffke had an understanding with the said Robert L. Knetzer by the terms of which the said Robert L. Knetzer would repay the aforementioned item of $11,300.00 out of assets which the said Robert L. Knetzer was concealing from your Trustee.

3. That because of the knowledge and participation on the part of the said Robert W. Jaffke in the schemes and practices of the said Robert L. Knetzer, the said petitioner cannot recover from your Trustee.

SECOND AFFIRMATIVE DEFENSE

14. That the petition upon which this claim is based does not set forth a good and sufficient cause of action upon which to base the claim of the petitioner and should be dismissed.

THIRD AFFIRMATIVE DEFENSE

That as shown on the face of said petition said petitioner claims to have made such payments to the said Robert L. Knetzer between the time from December 6, 1950 and November 1, 1951 and yet petitioner has not filed this petition in this Court until December 1, 1952; that said petitioner is guilty of laches and that to allow petition at this time will greatly hamper and interfere with the orderly administration of this bankrupt estate.

FOURTH AFFIRMATIVE DEFENSE

That because of the actions of the petitioner in connection with this matter the said petitioner does not come into this Court with clean hands, and is, therefore, barred from now asking for repayment of any money so advanced to the bankrupt.

FIFTH AFFIRMATIVE DEFENSE

That the circumstances, as related by the petitioner, do not create a trust either expressed or implied and the said

petitioner has no right to demand payment from your Trustee.

WILLIAM C. DUNHAM, Trustee
By /s/ G. W. Horsley
His Attorney

STATE OF ILLINOIS }
COUNTY OF SANGAMON } ss.

G. W. Horsley, being first duly sworn on oath, deposes and says that he has read the foregoing answer by him subscribed, as attorney for William C. Dunham, Trustee, and that he verily believes the matters contained therein are true and correct to the best of his information and belief; that certain matters therein not specifically denied are neither admitted nor denied for actual lack of knowledge and not for any other purpose.

/s/ G. W. Horsley

Subscribed and sworn to before me this 16th day of March, 1953.

/s/ L. H. Lenz
Notary Public

(Seal)
Indorsed, Filed
Mar. 16, 1953
G. W. Schwaner, Clerk

Received a true and correct copy this 17th day of March, 1953.

Roscoe Bonjean

MOTION TO MAKE MORE DEFINITE THE FIRST AFFIRMATIVE DEFENSE

(Filed on April 1, 1953.)

Now comes ROBERT W. JAFFKE, Petitioner in the above entitled cause of action, by Roscoe Bonjean and S. S. DuHamel, his attorneys, and moves to make more definite the statements in the first affirmative defense filed by the respondent, WILLIAM C. DUNHAM, Trustee in Bankruptcy in the estate of Robert L. Knetzer, one of the defendants in the above entitled cause, and as cause for such motion shows unto the court as follows:

(1) The allegations in paragraph 1 of said first affirmative defense being in words and figures as follows, the said Robert W. Jaffke had ample notice of the nature and conduct of the business of the said Robert L. Knetzer and had ample knowledge of his fraudulent schemes and practices in connection with the operation of his business, are but mere conclusions of the pleader and are vague and ambiguous in that the nature and kind of notice and when, where and how such notice was givien is not alleged; neither is the nature and conduct of the business of Robert L. Knetzer alleged or set forth; neither is the kind and extent of knowledge which said trustee alleges was ample; neither is there any showing as to what schemes were fraudulent or as to what practices in connection with the operation of his, Knetzer's, business were fraudulent and that by reason of the allegations in paragraph 1 of said first affirmative defense being so vague and ambiguous in failing to specify the facts necessary to show such knowledge, nature of or the manner of conducting such business and practices in connection with the operations of his, Robert L. Knetzer's, business, said defendant trustee's answer in paragraph 1 of his said first affirmative defense violates the provisions of section 12 (e) of the Civil Procedure Act and for such reason, therefore, said paragraph 1 and the allegations therein should be made more definite.

(2) The defendant trustee in paragraph 2 of said affirmative answer alleges statements upon the belief of said trustee and it is immaterial as to what such trustee believes and furthermore, the court cannot from such allegations set forth in paragraph 2 of said first affirmative defense make up and try an issue as to what the defendant trustee believes and by such reason said paragraph of said first affirmative defense and the allegations therein being so vague and ambiguous this petitioner cannot frame a responsive pleading, and petitioner therefore says that such allegations violate Rule 12 (e) of the Civil Procedure Act of the United States District Courts, and this petitioner therefore asks that the allegations set forth in paragraph 2 of said first affirmative defense be made more definite.

(3) The allegations set forth in paragraph 3 of said first affirmative defense are but a mere conclusion of the pleader for the reason that there is no allegation showing what knowledge or what participation, if any, on the part of the petitioner, Robert W. Jaffke, in the alleged schemes and practices of the said Robert L. Knetzer, and for such reason violates Rule 12 (e) of the Civil Procedure Act of the United States District Courts, and the statements in said paragraph 3 are so vague and ambiguous that this petitioner cannot frame a responsive pleading thereto, and therefore asks that the allegations or statements set forth in paragraph 3 of the first affirmative defense be made more definite.

REPLY TO SECOND AFFIRMATIVE DEFENSE

And now comes ROBERT W. JAFFKE, Petitioner, by Roscoe Bonjean and S. S. DuHamel, his attorneys, and as a reply to the second affirmative defense of the defendant, William C. Dunham, Trustee, herein says that he, said Robert W. Jaffke, denies the allegations set forth therein.

REPLY TO THIRD AFFIRMATIVE DEFENSE

18 And now comes ROBERT W. JAFFKE, Petitioner, by Roscoe Bonjean and S. S. DuHamel, his attorneys, and as a reply to the third affirmative defense of the defendant, William C. Dunham, Trustee, herein says that he, said Robert W. Jaffke, denies the allegations set forth therein.

REPLY TO FOURTH AFFIRMATIVE DEFENSE

And now comes ROBERT W. JAFFKE, Petitioner, by Roscoe Bonjean and S. S. DuHamel, his attorneys, and as a reply to the fourth affirmative defense of the defendant, William C. Dunham, Trustee, herein says that he, said Robert W. Jaffke, denies the allegations set forth therein.

REPLY TO FIFTH AFFIRMATIVE DEFENSE

And now comes ROBERT W. JAFFKE, Petitioner, by Roscoe Bonjean and S. S. DuHamel, his attorneys, and as

a reply to the fifth affirmative defense of the defendant, William C. Dunham, Trustee, herein says that he, said Robert W. Jaffke, denies the allegations set forth therein.

/s/ Robert W. Jaffke,
Petitioner
3540 Herford Street
St. Louis 9, Missouri.

/s/ Roscoe Bonjean
BY: Roscoe Bonjean
501 Myers Building
Springfield, Illinois

/s/ S. S. DuHamel
S. S. DuHamel
414 Illinois Building
Springfield, Illinois
Attorneys for Petitioner

Received a True Copy of the Foregoing Motion and Reply this first day of April, 1953.

G. W. Horsley
Attorney for William C. Dunham
Trustee in Bankruptcy

Indorsed, Filed
Apr. 1, 1953
G. W. Schwaner, Clerk.

AFFIDAVIT FOR CHANGE OF VENUE

(Filed September 24, 1954.)

I, Robert W. Jaffke, the petitioner in the above entitled cause, being first duly sworn, depose and say:

That the Honorable Charles G. Briggle, the judge before whom the above entitled matter is now pending, has a personal bias and prejudice against me and in favor of William C. Dunham, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, bankrupt, the respondent in the above entitled matter, and I state the following facts and reasons for my belief that such bias and prejudice exists:

That on or about the month of February, 1952, I conferred with the sitting judge in bankruptcy of this Court, the Honorable Charles G. Briggle, regarding certain funds which the bankrupt, Robert L. Knetzer, fraudulently obtained from me after said Robert L. Knetzer was adjudged a bankrupt by this Court and which funds are the subject of the above entitled reclamation petition, and at that time I requested permission of the Court to interview the bankrupt, Robert L. Knetzer concerning said funds; that said bankrupt was then in the custody of the U.S. Marshall and confined in the Springfield City Jail at Springfield, Illinois, pursuant to order of the Honorable Charles G. Briggle finding said bankrupt in contempt of this Honorable Court and I gained from such conference the knowledge that the Honorable Charles G. Briggle believed that all persons dealing with or contacting said bankrupt were all partners in crime and that the Honorable Charles G. Briggle had a similar impression as to me;

21 That shortly thereafter an indictment was returned in this Court against said bankrupt which included therein a charge that said bankrupt had fraudulently obtained money from me subsequent to the time that he was adjudged a bankrupt; that immediately following the return of said indictment, I was again refused permission by the Honorable Charles G. Briggle to interview the bankrupt concerning my claim as aforesaid, although I diligently sought such permission from the Honorable Charles G. Briggle for the purpose of obtaining evidentiary facts and documents from the bankrupt to substantiate my claim, which evidentiary proof I sought on the advice of the U.S. District Attorney for the Southern District of Illinois and his assistants which advice was given because of my cooperation with that office in its investigation leading to the return of a criminal indictment against said bankrupt, charging him with the crime of obtaining money from me by means of fraud;

That after the return of said indictment the said bankrupt's custody was changed from that of a civil contemnor to that of a defendant charged with a crime against the United States, and while in such custody, as a defendant

as aforesaid, he escaped from his confinement in the City Jail at Springfield, Illinois; that thereafter said bankrupt surrendered and after his surrender I was informed that the said Honorable Charles G. Briggle believed that I was responsible for said bankrupt's escape from confinement as aforesaid; that I am prepared to produce the persons who informed me that such expressions of belief were made to them by the Honorable Charles G. Briggle;

That by reason of the foregoing, I verily believe that the Honorable Charles G. Briggle has a personal bias and prejudice against me and that it will adversely affect the relief sought by my said reclamation petition;

That I am further informed and believe that in connection with the criminal investigation of said bankrupt, the Honorable Charles G. Briggle gained knowledge and information from persons who may be material witnesses on the trial of this case regarding the matters at issue in the above captioned reclamation petition, which knowledge and information are not matters of record in this Court but are prejudicial to my said claim and therefore, I verily believe that the Honorable Charles G. Briggle could not give me a fair and impartial hearing on my said reclamation petition;

That the matters set forth in the last three paragraphs of this affidavit first came to my attention while recently interviewing witnesses in an effort to assist my attorneys in the preparation of this case for hearing, which hearing was on the 20th day of September, 1954, set by the Honorable Charles G. Briggle for October 8, 1954 at 2:00 o'clock P. M.

Dated September 24, 1954.

/s/ Robert W. Jaffke
Affiant

Subscribed and sworn to before me, a Notary Public, in and for the County of Sangamon and State of Illinois this 24th day of September, 1954.

James C. Craven
Notary Public

My Commission expires February 5, 1957.

CERTIFICATE OF COUNSEL

We, the undersigned attorneys of record for Robert W. Jaffke, petitioner in the above entitled cause, hereby certify that the foregoing affidavit and application for Change of Venue as to Judge is made in good faith and not for the purpose of hindrance or delay and was prepared by us at his request from information given by him to us, and that we are informed as to the proceedings therein, and

We further certify that the pleadings in this cause are not at issue but are pending on motion of the petitioner to make the first affirmative defense of the respondent, William C. Dunham, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, bankrupt, more definite, and that on the 20th day of September, 1954, we were first notified by the Court that this cause was set for hearing before
23 the Honorable Charles G. Briggle at 2:00 o'clock P. M. on October 8, 1954.

Dated September 24, 1954.

/s/ William M. Giffin
William M. Giffin
Wanless, Craven & Giffin
First National Bank Building
Springfield, Illinois

/s/ S. S. DuHamel
S. S. DuHamel
Illinois Building
Springfield, Illinois

/s/ Roscoe Bonjean
Roscoe Bonjean
Myers Building
Springfield, Illinois

To the Clerk of Above-named Court:

Application is hereby made, for the reasons set forth in the foregoing affidavit and certificate, that appropriate pro-

ceedings be taken under 28 USC 144, as amended in 1949, to assign another judge to hear the proceeding.

Dated September 24, 1954.

/s/ William M. Giffin
William M. Giffin
Wanless, Craven & Giffin
First National Bank Building
Springfield, Illinois

/s/ S. S. DuHamel
S. S. DuHamel
Illinois Building
Springfield, Illinois

/s/ Roscoe Bonjean
Roscoe Bonjean
Myers Building
Springfield, Illinois

I, William M. Giffin, one of the attorneys of record for petitioner in the above entitled cause hereby certify that I have this 24th day of September, 1954, delivered a true copy of the foregoing affidavit and application for Change of Venue as to Judge to Mr. G. William Horsley, the attorney of record for the respondent at his office at 408 East Adams Street, Springfield, Illinois.

/s/ William B. Giffin

Received a copy this 24th day of September, 1954 at 11:45 A.M.

/s/ G. W. Horsley

Indorsed,
Filed Sept. 24, 1954
G.W. Schwaner, Clerk.

APPLICATION TO DISQUALIFY JUDGE

24 (Filed on September 24, 1954.)

25 To the Honorable Charles G. Briggle, Judge of the said Court:

The petition of Robert W. Jaffke, petitioner in the above entitled cause respectfully represents that the matter in controversy in said cause concerns a large amount of money which petitioner claims the above named bankrupt, Robert L. Knetzer, fraudulently obtained from petitioner after said Robert L. Knetzer was adjudged a bankrupt by this Court and that said bankrupt paid over said sum of money to the above named respondent, William C. Dunham, Trustee in Bankruptcy of the Estate of said bankrupt, without the knowledge or consent of petitioner; wherefore petitioner seeks by his said petition to recover said sum of money from said Trustee in Bankruptcy;

That the Honorable Charles G. Briggle, Judge of said Court in which said action was commenced and is now pending, and who is required by law to hear and decide the same, is a material witness for petitioner in the above entitled cause for the reason that certain material matters not of record in this Court, including orders issued by the Honorable Charles G. Briggle in the above numbered Bankruptcy cause which are material to the matter in controversy herein, are within the knowledge of the Honorable Charles G. Briggle and for the further reason that petitioner is informed and believes that in connection with the criminal investigation of said bankrupt, the Honorable Charles G. Briggle gained knowledge and information
26 from the parties to the above entitled matter and from persons who may be material witnesses on the trial of the above entitled cause, which knowledge and information is material to the issues involved in the above entitled cause all as set forth in affidavit of petitioner for Change of Venue as to Judge this day also filed in the above entitled cause.

WHEREFORE, petitioner prays that another judge may be designated in the manner provided by law in such cases.

Robert W. Jaffke
Petitioner

STATE OF ILLINOIS }
COUNTY OF SANGAMON } SS.

Robert W. Jaffke, the petitioner in the above entitled cause, being first duly sworn deposes and says that he has read and signed the foregoing application to disqualify judge and that the matters therein set forth are true in substance and in fact except as to those matters which are alleged upon his information and belief and as to those matters he believes them to be true.

Robert W. Jaffke
Affiant

Subscribed and sworn to before me this 24th day of September, 1954.

James C. Craven
Notary Public

My Commission expires Feb. 5, 1957.

William M. Giffin
Wanless, Craven & Giffin
First National Bank Building
Springfield, Illinois

S. S. DuHamel
Illinois Building
Springfield, Illinois

Roscoe Bonjean
Myers Building
Springfield, Illinois
Attorneys for Petitioner

I, William M. Giffin, one of the attorneys of record for petitioner in the above entitled cause hereby certify that I have this 24th day of September, 1954, delivered a true copy of the foregoing application to disqualify judge to Mr. G. William Horsley, the attorney of record for the respondent at his office at 408 East Adams Street, Springfield, Illinois.

William M. Giffin

Indorsed, Filed
Sept. 24, 1954, G. W. Schwaner, Clerk

27 TRANSCRIPT OF PROCEEDINGS

September 24, 1954

28 Proceedings had and evidence taken in the above-entitled cause before the Honorable Charles G. Briggle, Judge of said court, in his court room in the United States Court House, at Springfield, Illinois, commencing on the 24th day of September, A. D. 1954, at 1:50 o'clock p.m.

PRESENT:

MR. WILLIAM M. GIFFIN of the firm of MESSRS. WANLESS, CRAVEN & GIFFIN, First National Bank Building, Springfield, Illinois,

and

MR. ROSCOE BONJEAN, Myers Building, Springfield, Illinois, appeared for the petitioner. MR. G. WILLIAM HORSLEY, 408 East Adams Street, Springfield, Illinois, appeared for the respondent.

PROCEEDINGS

29 The Court: I have another matter to take up for a few minutes before we proceed with the case on trial.

Mr. Bonjean: At the request of our client, the counsel of record in this cause of Jaffke versus William C. Dunham, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, Bankruptcy No. 11-789, we have been requested to file, and we have filed, an affidavit for a change of venue; and we would like to have that matter heard and passed upon by the court prior to any hearing on a motion that has been set for hearing this day in this matter.

Mr. Horsley: My name is G. William Horsley, attorney for the defendant, William C. Dunham, in this matter. I had this served on me at 11:45 this morning, the first time I have seen it. I am not as well prepared to take it up as I should be; but if the court wants to take it up, I think I can argue the matter at this time.

The Court: This matter was set specifically to hear the petitioner's motion to make more definite the first affirmative defense that the trustee has pleaded to his petition.

Mr. Horsley: That is right. That is what we came over to argue.

30 The Court: That motion was filed in the court on April 1, 1953. I don't know why it hasn't been brought to the attention of the court before. But at any rate, it is set for hearing today.

Now, I have just been handed the petition, the affidavit that counsel is referring to, for a change of venue. I suppose that should have attention at the earliest possible moment, before I undertake to hear the other petition.

I will hear what you have to say on that.

Mr. Bonjean: If the court please—

Mr. Horsley: Your Honor, may I ask one question before we proceed with that? I would like to have assurance that that affidavit was signed by Robert Jaffke in the presence of the notary public, and that he was sworn by that notary public and gave it under oath as administered by the notary public. I would like to have Mr. Jaffke assure the court of that before we proceed further in that matter.

Mr. Bonjean: If the court wishes it. He is here and he will certainly give that assurance, but I think the affidavit—

Mr. Horsley (Interposing): I want no impeachment of it, and I would like to have him assure the court.

31 The Court: The notary public, whoever it is, has certified that Jaffke subscribed and swore to the affidavit.

Mr. Horsley: I would like to have Mr. Jaffke, who is present here in court, to so acknowledge, if the court please.

Mr. Giffin: Mr. Jaffke is here, and I feel this: that there is a case law that holds that the affidavit speaks for

itself. Now, I have no objection to Mr. Jaffke being sworn and making such a statement.

Mr. Horsley: I don't have to have him sworn, just so he will tell the court, in the presence of the court reporter, that he was administered under oath at the time he signed the document.

Mr. Bonjean: We will be glad to do it, but we think it is superfluous.

The Court: You can assure counsel that Mr. Jaffke did swear to the affidavit?

Mr. Giffin: Mr. Jaffke answers that it is correct.

The Court: What have you to say on the change of venue?

Mr. Bonjean: On a matter of this kind, the affidavit
32 speaks for itself. I don't know whether the court has read the affidavit or not, but I think it embodies all of the requirements of the law for a change of venue, and we respectfully request the court to consider the affidavit and grant the change of venue requested.

It sets forth the facts on which the jurisdictional facts required under the law for a change in venue should be granted; and on the strength of that, we respectfully ask that it be granted. That is under Section 14 of the Code.

The Court: Section 14 of the Code?

Mr. Bonjean: That is right, your Honor.

The Court: I just barely glanced at it. Let me look at it again.

The statute says any party to a proceeding in District Court may produce a timely motion. Doesn't it say something about the timeliness of this?

Mr. Bonjean: This court has not passed upon any question whatsoever, either in the form of a pleading or otherwise, in this cause. The matter is not even at issue, and, of course, the application is timely because if this court had made some rulings in this cause that had been adverse

to this person and then he sought such an applica-
33 tion, it would not be timely. But in view of the fact that there has been nothing heard in this matter and it is not even at issue yet, it certainly is timely, your Honor.

The Court: Did I have any motions to strike in this case?

Mr. Bonjean: Nothing.

The Court: Didn't you allege some matters in defense that I heard on motions to strike, or was that on one of the other cases.

Mr. Horsley: That was in one of the other cases, but I was under the impression that there was a motion to strike the complaint in this case.

Mr. Bonjean: Not that I know of.

Mr. Horsley: That motion was heard by the court, and this court did render a decision on that.

Mr. Giffin: What Mr. Horsley is referring to there is when a complaint was filed on the District Court side for a plenary suit, which had no connection with the petition filed in the bankruptcy.

Mr. Bonjean: That was a different suit entirely.

Mr. Giffin: If you recall, all counsel chatted in chambers.

34 The Court: Jaffke filed a plenary suit in this court?

Mr. Bonjean: Yes, sir, your Honor.

The Court: While seeking recovery of the same fund that is now—

Mr. Horsley (Interposing): I filed a motion to dismiss that suit, and I am sure there was an order on the motion.

Mr. Giffin: The order in that case was there was a pending matter in the bankruptcy.

The Court: The petition had already been filed in the bankruptcy court prior to that?

Mr. Bonjean: That is right.

Mr. Giffin: That was the basis of the court's order dismissing the complaint in the District Court.

The Court: Whatever the basis was, I did enter an order dismissing that complaint?

Mr. Giffin: That is right.

Mr. Horsley: Now, if it please the court, the matter that was originally filed was filed as No. 11-789 in bankruptcy, addressed to this court—this is addressed to the Honorable Charles G. Briggle in this matter. That was filed December 1, 1952.

The Court: Wait just a minute. December 1, 1952, yes, that is right.

35 Mr. Horsley: Thereafter, I believe they paid a filing fee on it, if I am not mistaken.

Mr. Giffin: We paid a filing fee and posted a bond under a court number. We were assigned a legal number in the District Court.

The Court: Well, you filed a suit at law.

Mr. Giffin: A suit at law.

The Court: Against the trustee, seeking recovery of this fund on the common law side, and that was subsequently dismissed by the court.

Mr. Giffin: By the court on the motion of the defendant trustee that there was a prior action pending in the bankruptcy court.

The Court: Well, that might have been one of the reasons, but I expect there were other reasons.

Mr. Giffin: That is the reason you assigned in your opinion. You gave a memorandum authority, your Honor, that there was a matter pending in the bankruptcy court. If you recall, we discussed the feasibility of just changing over from the bankruptcy side to the law side in chambers, and that was discussed with all counsel present. At that time, the question of a change of venue arose in the dis-

cussion, and there were matters taken up at that time of another suit pending in the law side of the court, and the
36 thought was that this cause could be tried at the same time on the law side as the pending case.

And then the attorney for the trustee filed a motion to dismiss the complaint and the court, on the hearing of the motion, sustained the complaint and took under advisement the single question of whether or not the pending petition in the bankruptcy court denied the plaintiff from filing a suit on the law side. Then the order was entered on the basis of your findings of the law regarding the previous petition pending in the bankruptcy side of the court.

The Court: I think that is substantially correct, that the matter filed at law, No. 1569, was dismissed by this court on December 24, 1953, upon the finding that there was a petition pending in No. 11-789, bankruptcy, covering identical subject matter of the complaint in the suit at law and praying for identical relief.

It was agreed between the parties at that time, according to the order that was entered, that the issues in the bankruptcy matter were the same as those in the suit at law, and the court allowed the motion to dismiss and dismissed the suit at law.

37 Now, the bankruptcy petition is what is before the court this afternoon, and it is in that proceeding that you have today filed an affidavit for a change of venue?

Mr. Giffin: That is right, your Honor. And this motion regarding the affirmative defense, your Honor, has been outstanding almost a year.

The Court: The motion by the petitioner, the petition in the bankruptcy proceeding was filed December 1, 1952. The trustee answered on March 16, 1953, and on April 1, 1953.

Mr. Horsley: 1954.

The Court: No, 1953. The petitioner filed a motion asking that the first affirmative defense pleaded by the trustee

be made more definite; and at the same time, the petitioner answered the other affirmative defenses.

Now, we get to this affidavit for a change of venue.

Mr. Horsley: May I be heard briefly on that matter?

The Court: I don't think I require any argument, gentlemen.

The affidavit says that the affiant Jaffke in the month of February 1952, he says he conferred with Briggle
38 regarding certain funds which Knetzer, the bankrupt, fraudulently obtained after Knetzer was adjudged bankrupt by this court, and which funds are the subject of another petition entitled "Reclamation Petition." And he says that at the time he requested permission of me to interview the bankrupt Knetzer concerning said funds, that said bankrupt was then in the custody of the United States Marshal and confined in the jail at Springfield pursuant to an order of Briggle finding the bankrupt in contempt of court. And the affiant says that he gained from such conference the knowledge that Briggle believed that all persons dealing with or contacting said bankrupt were partners in crime and that Briggle had a similar impression as to him.

Well, that is a pretty broad statement. I have been accused by a lot of people doing business with this bankrupt. But he doesn't state any fact. He just says he gained the impression from some conference that he had with me.

I recall his coming into the chambers and asking permission to visit the bankrupt at the jail, and I think I denied him that privilege. I think that is what he says here.

39 Now, he says shortly thereafter the indictment was returned in this court against the bankrupt, which included a charge that the bankrupt had fraudulently obtained money from him, Jaffke, subsequent to the time that he was adjudged bankrupt; that immediately following the return of said indictment, he was again refused permission by me to interview the bankrupt concerning his claim, although, he says, he diligently sought such

permission from me for the purpose of obtaining facts and documents from the bankrupt. But after the return of said indictment—he is referring to a criminal indictment—he says was returned in this court against the bankrupt, bankrupt's custody was changed from that of a civil contendor to that of a defendant charged with crime, and while in such custody as a defendant as aforesaid, he escaped from his confinement in the city jail at Springfield. Thereafter the bankrupt surrendered and after his surrender, he, Jaffke, was informed that Briggle believed that he, Jaffke, was responsible for said bankrupt's escape from confinement, and that he is prepared to produce the person who informed him of such expressions of belief.

Who that could possibly be is pure speculation and what the facts are upon which Jaffke got that impression are pure speculation and pure figments of his imagination, I suppose. Of course, there was an investigation made at that time about the escape, and different persons were called in to be interviewed, including the police officers at the jail. Of course, the United States attorney and the FBI did most of that investigation; it wasn't the court that did it. I don't recall—certainly, I never talked to Jaffke about the escape of Knetzer from the jail.

I think this affidavit is about the first that I ever heard that anybody suspected Jaffke of having been instrumental in the escape of Knetzer from the jail. That seems to be some notion of his. I don't know why he should get such an idea as that.

By reason of the foregoing, he says, I am biased and can't try a case.

The affidavit is wholly insufficient as an affidavit under the provisions of the statute. It is wholly insufficient for other reasons; particularly it is not timely. It never apparently occurred to him to make such an affidavit until this motion to strike the defense was set for hearing at 2 o'clock today. Now he comes in and presents a motion.

41 The motion for a change of venue is overruled.

Now, what about the motion to strike the first affirmative defense? Do you want to be heard on that, gentlemen?

Mr. Giffin: If the court please, we would like to make an additional record, if we could, on this motion denying the change of venue.

The Court: To what extent?

Mr. Giffin: We would be happy to even go beyond what the case law requires, your Honor. We will put the party making the affidavit on the stand in support, with corroborative testimony that his facts are accurate.

We also have another application here, your Honor, that I would like to present.

Mr. Horsley: May the record show, your Honor, that on behalf of the defendant William C. Dunham, I have been handed another application to disqualify the judge. This is the first time that I have seen it.

The Court: The record may also show that the court has just been handed a similar application, and I am now about to read it.

42 The application to disqualify the judge, now presented for the first time, on the basis that Briggle might be called as a witness in the case, is obviously presented just for the purpose of delay and for the purpose of obstructing the due administration of justice; and that application is overruled.

Mr. Giffin: If the court please—

The Court (Continuing): Now, I will say in connection with that, that if there are any facts—I know of no fact that this court can testify to that can't be proved by a dozen different witnesses or by matters of record in this court—but if there are any facts that this court is expected to testify to, if you will submit what those facts are in writing, if they are true and accurate, they can, no doubt, be admitted by the trustee.

You state nothing in your application as to what the facts are; it is just a vague affidavit that Briggle will be

A. Correct, yes, sir.

Q. Did you have any further contact with Mr. Knetzer after that?

A. One time passing through Edwardsville at a restaurant called Musso's on the square.

Q. Do you remember where it was? When?

A. No, sir, I don't. It could have been two weeks or two months after the bankruptcy. I would say it would be more like two months because the bankruptcy more or less quieted down, I mean there wasn't anything—

Q. Did you make inquiry at that time about your money?

A. No, sir, I ran into Mr. Knetzer, as I came out of
82 the restaurant Mr. Knetzer was standing outside. I talked to him a few minutes, and that day was the last I saw of him until he called me two years later.

Q. What was the date of that?

A. December 6, 1950, in the evening.

Q. That was some approximately two years later?

A. Safely two years, yes, sir.

Q. And what was done pursuant to that telephone call, if anything?

A. You mean following the phone call?

Q. Yes.

A. He requested me —

Mr. Horsley: I object to any conversation between this man and Knetzer.

The Court: Is that the same objection you made before?

Mr. Horsley: That is an additional objection as to conversation that he, first, isn't competent to testify in the case, secondly, the objection is that no conversation with Knetzer can be binding on the trustee. It would be pure hearsay.

called as a witness in the proceeding; and I take no stock in it at all, except that it is filed for the purposes of obstructing justice.

Mr. Giffin: But, if the court please, obstructing justice—this is not a criminal matter.

43 The Court: There is lots of justice available in civil matters, as well as criminal, Mr. Giffin.

Mr. Giffin: I appreciate that; but here we have the person, the party whose affidavit has been submitted, the petitioner in this court to reclaim money. It is not a frivolous claim; it involves a large sum of money. Here we have an attorney for the trustee that lets an entire year go by without responding to pleadings.

The Court: I don't care to listen to that harangue. Your motion has been denied.

Do you care to present anything on the motion to compel the trustee to state more specifically the matters of his first affirmative defense?

Mr. Giffin: I think, your Honor, we would like to have Mr. Jaffke take the stand and be sworn. I think we have to take a record if we are going to an appellate court, to a court of appeals, on this matter.

The Court: I don't care to hear any evidence. I will now call upon you to submit your—

Mr. Giffin (Interposing): I would just like that record made that the court would not permit any evidence to be introduced on the affidavit. I am sorry your Honor.

44 The Court: Counsel offers to call the maker of the two affidavits that have already been passed upon, offers to call the affiant to the witness stand; is that what you are wishing to do?

Mr. Giffin: The court, in his denial of the affidavit, said that they weren't fact, that they were just conclusions.

The Court: The statute provides you are only entitled to present one affidavit. You have already presented two, and I will not hear any further testimony from the

Mr. Bonjean: We think this clearly comes under an exception to the hearsay rule, for which I will submit
83 authority to the court.

The Court: I am not too positive about it. I think I will permit it to go in, and all of which may be stricken if the—

Mr. Horsley: The additional objection at this time is to conversation before the payment of any money or before the title is passing to the trustee, and I am making that specific objection that it is purely hearsay evidence and not binding on the trustee.

If there are any admissions in this testimony, those are likewise not binding on the trustee.

The Court: All right. You may proceed.

Q. At that time, Mr. Jaffke, tell the court what took place between you and Mr. Knetzer at the Sheraton Hotel.

Is that where you met?

A. In the lobby of the Sheraton Hotel.

Q. Was that at his instruction?

A. Yes.

Mr. Horsley: The same motion to strike will run?

84 The Court: That's true.

A. He confronted me with a report of a large scale building operation which he had under process, which involved the reactivating of a large Air Base near Great Falls, Montana, and would create a terrific housing shortage for the personnel coming into that Base. He explained it as being a mess due to the Korean crisis, stating there was a war scare coming up, "the government is going to enlarge this," enlarge this Air Base as a safety feature, and a housing shortage was definitely there, that he was working on the possibilities of procuring this loan and the development of this housing.

Q. What loan?

affiant. That petition is denied. I give to you whatever record you want.

Do you care to be heard on this other matter?

Mr. Giffin: We do not desire to be heard on the motion.

The Court: The motion to make more definite and certain is overruled; and the case has already been set for trial for October 8 at 2:00 o'clock. Please be ready at that time.

You may call in the jury, Mr. Bailiff.

Mr. Horsley: Your Honor, may I present one short matter?

The Court: Yes.

45 Mr. Horsley: In the matter of the reclamation petition in No. 11-789, I have prepared findings of fact, conclusions of law and an order thereon. I would like to just leave this with your Honor so you can leaf them over at your leisure.

The Court: Have you furnished counsel for the petitioner a copy?

Mr. Horsley: I furnished counsel for the petitioner a copy and notified them that they would be presented today at 2:00 p.m. on this date and that if they had any objections or any additional suggestions, they can communicate it to the court.

(Whereupon, at 2:25 o'clock p.m., September 24, 1954, the hearing was closed.)

46 STATE OF ILLINOIS }
COUNTY OF COOK } SS:

Doyne W. Spencer, being first duly sworn, on oath says that he is a court reporter doing business in the City of Chicago; that he reported in shorthand, as the official reporter, the proceedings at the said hearing, and that the foregoing is a true and correct transcript of his shorthand notes so taken as aforesaid, and contains all of the proceedings had at the said hearing.

/s/ DOYNE W. SPENCER.

Subscribed and sworn to before me this 30th day of September, A. D. 1954.
(Seal) /s/ JULIAN R. HALL.
Indorsed, Filed Oct. 6, 1954.
G. W. SCHWANER, Clerk.

ASSIGNMENT OF JUDGE

47 (Entered October 8, 1954.)

48 In the matter of the above petition against the trustee in bankruptcy, assignment is hereby made to the Honorable J. LeRoy Adair, one of the judges of this court for hearing and disposition.
October 8, 1954.
/s/ Chas. G. Briggle
United States District Judge
Indorsed
Filed Oct. 8, 1954
G. W. Schwaner, Clerk.

TRANSCRIPT OF PROCEEDINGS

49 October 14 & 15, 1954

50 TRANSCRIPT OF EVIDENCE taken and proceedings had in the trial of the above entitled cause before the HONORABLE J. LEROY ADAIR, one of the Judges of said Court, in his court room in the United States Court House at Springfield, Illinois, on the 14th and 15th days of October, A. D. 1954, beginning at the hour of 2 o'clock p.m. on Thursday, October 14, 1954.

54 The Court: Are you ready to proceed, gentlemen, on both sides?

Mr. Bonjean: Yes, Your Honor.

Mr. Giffin: If the court please, on this letter regarding the subpoena on Mr. Cohn, I am wondering if I could chat with counsel about a stipulation.

The Court: Yes, you may do anything you want to about this.

(Discussion off the record)

The Court: Is the witness ready to testify?

A. It was, I think, the corporation.

Mr. Horsley: I object to this unless he knows of his own knowledge.

Mr. Boujean: He told him this.

Mr. Horsley: He isn't saying that.

Q. Say what he told you.

A. Knetzer showed me a charter of the corporation he had formed.

Q. What was the name of that corporation?

85 A. Called the Bison Mining & Development Company, and he listed the members of this corporation for me, that they were all well to do men, that he himself was just the manager, but he had an influential man who was arranging a loan for them for this corporation, to be used for the purpose of building these houses. It was a large scale operation. He told me it would run into two years before it was completed.

Q. Did he make any representations to you at that time with respect to the need of any money?

A. Yes, he said that he had considerable expenses, said he couldn't operate sooner than he did because of a huge government tax lien against him, which he had recently had rejected or thrown out. I don't know just the word he used, but he represented a man by the name of John Snyder as having beat that tax claim for him, and now that the tax claim was out of the way he was free to go ahead and swing this deal and make money for everybody interested in it, and listed the members, and he walked to the phone to call one of them to verify it for me, but I told him that wasn't necessary because at that very moment I wasn't planning on listening to his operation but, the more
86 he talked, the more likely it sounded. He had just finished a similar building deal which was promising to show 50% return, and money undoubtedly was being made in the building business, so we left then with the understanding that I would meet him in the morning, but still hadn't decided to give him any money.

Mr. Bonjean: Your Honor, in order to clear the air on this matter (because there has been so much odium attached to prior proceedings dealing with the Knetzer affair), I would, with the permission of the court, like to have the privilege of making a brief statement, —.

The Court: That's all right.

Mr. Bonjean:—to Your Honor about this case.

Mr. Horsley: Before you do that, would you mind, for the purpose of the record, that we suggest to the court the death of Robert L. Knetzer on August 26, 1953, and that at the time of his death he left him surviving a widow and two minor children, which are minors at the time of this hearing?

55 The Court: Is there any objection to that suggestion? We had that up the other day in the other matter.

Mr. Bonjean: Did you contact those people?

Mr. Horsley: I had a certified copy of the marriage record and birth records that were introduced in the Riley trial.

Mr. Giffin: You didn't intend to bring them as witnesses to this hearing, did you?

Mr. Horsley: I had certified copies which I can produce here today, if need be.

Mr. Giffin: There is a child by the former marriage and a child by the wife at the time of decease.

What would you think of dismissing Knetzer as a party?

Mr. Horsley: That's, of course, none of my affair, but I think it should be understood by the court that Knetzer is dead, and that he left a widow and two minor children. I am prepared to prove that by the certified copies if you want them.

The Court: They are already filed in the other case we heard the other day, aren't they?

Q. Was Mr. Knetzer accompanied by anyone at that time?

A. No, he was definitely by himself, and I even asked him about that because a short while before that I had noticed in the paper that he was supposed to be in the custody of a marshal, and I did ask him about it, and he said it was all paper talk, that definitely wasn't true, that all he had to do was from time to time report as to his whereabouts, and from then on for the next four weeks I can safely say I did not see him at any time in the company of or handcuffed or otherwise to a marshal. Had I seen it at that time, I might have been—

Mr. Horsley: I object to that.

The Court: That may be stricken.

Q. Just state what the conversation was and what you did.

A. I asked him about when this corporation had been formed, when it was started, and he said that he had
87 started on his deal in 1949 and, as I remember, I think he formed the corporation in 1950.

Q. Now, did you meet him the next morning?

A. I met him the next morning.

Q. Where did you meet him the next morning?

A. On 7th and Olive Street.

Q. In St. Louis?

A. That's right. We had a cup of coffee together in a drug store, and he talked some more.

Q. What took place at that time?

A. After he convinced me it was a good deal,—

Mr. Horsley: Object, and move to strike it.

The Court: It may be stricken.

Q. Did you believe the representations he made?

It's a question of whether you want to dismiss.

Mr. Bonjean: If we may, Your Honor, we will determine that. We should decide that now, I suppose.

56 The Court: We can allow this suggestion.

Mr. Bonjean: Then we can determine that later on.

The Court: Suggestion of the death of Robert L. Knetzer is entered and the survivors of the said Robert L. Knetzer, deceased, are Violet Knetzer, the widow, and two minor children, —

Mr. Horsley: Yes, Your Honor.

The Court: —namely, — Do you know them? Michael and Robert?

Mr. Horsley: I will have to go into the Clerk's office. Can we show that is by agreement?

(Discussion off the record)

Mr. Horsley: There is Kathleen Mary Knetzer, daughter by the first wife.

The Court: Now, what else do we have?

Mr. Bonjean: As I stated to the court, I would like the privilege of making a short, brief statement.

The Court: That's all right.

64 The Court: Do you care to make a statement?

Mr. Horsley: No, I don't want to make any opening statement.

The Court: This is a claim filed before the Referee, is that true?

Mr. Horsley: A reclamation suit.

Mr. Giffin: Filed to the District Judge.

The Court: I am asking for my own information.

Mr. Bonjean: For the court sitting in bankruptcy.

The Court: You attempted to file another suit?

Mr. Giffin: A plenary suit on the District Court side.

65 The Court: You are now basing this on a claim?

Mr. Bonjean: The court determined we had submitted ourselves to the jurisdiction of the court, and had no right to file a plenary suit.

The Court: You may call a witness.

Mr. Bonjean: We do have a lot of documents to be admitted in evidence that were considered in the jury trial, and we have that file here.

To save time, I am wondering if we can stipulate to the admissions of the turn over order, turnover order of July 11, 1949.

Mr. Horsley: No objection.

The Court: They may be admitted. Number 1.

(Whereupon said document heretofore referred to was marked Petitioner's Exhibit 1 for identification and admitted into evidence)

Mr. Giffin: Number 2 is a report of the trustee.

The Court: Any objection?

Mr. Horsley: No objection.

The Court: It may be admitted under the same number. That is what? 2?

(Whereupon said document heretofore referred to was marked Petitioner's Exhibit 2 for identification and admitted into evidence)

66 Mr. Giffin: Number 3, the order to show cause, entered on November 2, 1949.

The Court: Any objection?

Mr. Horsley: No objection.

The Court: It may be admitted.

(Whereupon said document heretofore referred to was marked Petitioner's Exhibit 3 for identification and admitted into evidence)

Mr. Giffin: The contempt citation as entered in the bankruptcy case on December 1, 1949.

The Court: Number what? 4?

Mr. Horsley: Those are properly before the court.

The Court: There might be a question of an appeal or something of that sort, that it might be entered here.

Any objection?

Mr. Horsley: No objection.

The Court: It may be admitted.

(Whereupon said document heretofore referred to was marked Petitioner's Exhibit 4 for identification and admitted into evidence)

Mr. Giffin: Number 5 is March 25, the finding of facts by the court on the contempt citation.

The Court: Any objection? It may be admitted.

67 (Whereupon said document heretofore referred to was marked Petitioner's Exhibit 5 for identification and admitted into evidence.)

(Discussion off the record.)

The Court: Are you withdrawing that offer?

Mr. Giffin: It may not be here.

The Court: If you make it, all right.

Mr. Giffin: 5 would be the petition as filed in this court for an order vacating the commitment for contempt.

Mr. Horsley: That I most certainly do object to as being a self-serving document of the bankrupt Knetzer, which cannot be in any way binding on his trustee.

The Court: That was what petition?

Mr. Giffin: Filed by the bankrupt, stating that he had no assets.

The Court: When was that filed?

A. No, it was a payment to be made to the court on his bankruptcy account of some $250,000.00 and which he had agreed to turn into court.

Q. Which he told you he had agreed to return into court?

A. We discussed that the first night to some little extent. He said that the he had signed such an agreement under duress.

Mr. Horsley: Oh, I object to that.

The Court: Yes.

A. He told me—

Mr. Horsley: I object to this.

91 The Court: Sustained to what he told you about why he signed any statement.

Q. You gave him some more money two hours later? How much did you give him then?

A. I give him $3800.00 toward payment to the court, which he said would give him ample time to do all he had to do to complete the deal and approval of the loan.

Q. So on this day you gave him a total of $6100.00, is that right?

A. $6100.00 in two payments some two hours apart. Do you want my receipts?

Q. Do you have receipts for those payments?

A. (Witness produces documents.)

Mr. Bonjean: Will you please mark these as Exhibits 10, 11, 12, 13, 14 and 15?

(Whereupon said documents heretofore referred to were marked Petitioner's Exhibit 10, Petitioner's Exhibit 11, Petitioner's Exhibit 12, Petitioner's Exhibit 13, Petitioner's Exhibit 14 and Petitioner's Exhibit 15, respectively, for identification.)

Q. I hand you herewith Petitioner's Exhibit 10. Tell the court what that is.

Mr. Giffin: That was filed April 11, 1950.

The Court: Was that after this proceeding you are talking about here?

Mr. Giffin: Yes, sir.

The Court: Why would it be important?

Mr. Giffin: As to—It was at the hearing on that
68 petition that the trustee testified, and there was also admission at that time by the bankrupt, that he had borrowed large sums of money from various individuals, apprising the trustee that Knetzer was going out obtaining loans at that time in an endeavor to raise money to pay on the turnover order.

Mr. Horsley: We object to that as being hearsay. If it is an admission of the bankrupt (and I don't believe it is) it would not be admissible against his trustee. It comes after the incident of which complaint is made here.

Mr. Giffin: We can withhold our offer.

The Court: I think you had better do that.

Mr. Giffin: My point is it is a record of this court where the trustee and his attorney cross examined the bankrupt at an open hearing.

The Court: Is it identified?

The Clerk: I don't have it here.

The Court: You can think that over.

There is no offer, then?

Mr. Bonjean: No offer at this time.

(Discussion off the record.)

Mr. Giffin: I have a verified petition of the bank-
69 rupt after the loans were obtained from this claimant, March 11, 1952, that is a petition to purge the bankrupt of contempt.

I think that's all we need to work with right now.

A. Maybe we had better make a correction right away. I notice the bank was called "Mercantile Com-
92 merce Bank." Since that time it has been changed to the Mercantile Trust. It is one and the same.

It shows—

The Court: Not what it shows. What is it?

A. Bank check of Mercantile Trust Company.

Q. What date did you withdraw $2300.00 from that bank?

A. December 7. This deposit shows—

Mr. Horsley: Object to what it shows.

The Court: Yes.

Q. December what?

A. December 7 I withdrew two checks.

Q. Was that 1950?

A. 1950.

Q. You withdrew one amount of what? $2000.00? State what you did do.

A. One check for $2300.00 and one for $3800.00.

The Court: It is the check book that compares with the checks you are going to offer? You wouldn't need any explanation.

Q. I note on the day of December 7, 1940, the withdrawal shown.

93 That is a deposit.

Q. Deposit of $2000.00?

A. That's my collateral loan I made. That is the yellow sheet you have.

Q. I will hand you herewith Petitioner's Exhibit 14. State what that is.

The Court: All right. You may proceed, gentlemen.

WHEREUPON the petitioner, to maintain the issues in his behalf, offered the following evidence in chief, viz:

ROBERT W. JAFFKE, the petitioner, called as a witness in his own behalf, and having been first duly sworn, testified as follows, in answer to Direct Examination by Mr. Bonjean:

Q. State your name, please.

A. Robert W. Jaffke, J-a-f-f-k-e.

Q. And you are the petitioner in this cause?

A. Yes, sir.

Q. Where do you live, Mr. Jaffke?

A. 6200 Chippewa Street, St. Louis, Missouri.

Q. How old are you, Mr. Jaffke?

70 Mr. Horsley: At this time I wish to interpose an objection to the testimony of this witness as being an interested party and not qualified to testify in this case under Section 2 of the Evidence Act of the State of Illinois, and under the rules of evidence of the United States Supreme Court and the statutes applicable to this matter.

The Court: You are referring especially to the "dead man's statute?"

Mr. Horsley: Yes, sir.

The Court: At this time it will be overruled. Go ahead. I can feel a little more at liberty to try a case without a jury because I will permit both of you to submit a brief on the matter.

Mr. Horsley: So I don't prolong this hearing, have it considered as a running objection.

The Court: I think you may do that. We can do that much easier when there isn't a jury than where there is.

Mr. Horsley: And a motion to strike each answer.

71 The Court: That's right.

Mr. Horsley: And I can cross examine without waiving any rights to get it in the record? Is that agreeable?

The Court: Yes.

Mr. Horsley: I won't make any further objection under the "dead man's statute" to this testimony.

The Court: The court will enter your objection to the class of testimony being entered.

Q. (By Mr. Bonjean.) What is your business or occupation? Your age?

A. Forty-one.

Q. What is your business or occupation?

A. General insurance and real estate loans.

Q. In the city of St. Louis?

A. Yes. 6454 Marmaduke.

Q. Is that in an office—

A. In my mother's home. I have my desk space in my mother's home.

Q. How long have you been engaged in that business?

A. I have been in business for myself since 1939.

Q. Are you duly licensed in the State of Missouri as
72 an insurance broker?

A. As an insurance broker, yes, sir.

Q. Do you have any family, Mr. Jaffke?

A. I have a little girl nine and my wife.

Q. Are you living with your wife and child?

A. Living with my wife and child, with her mother and father. Since this episode we have sold all our property, and are living with the mother and father.

Q. Calling your attention to on or about the year 1948, did you have any business dealing direct that were with the Knetzer Motor Sales of Edwardsville, Illinois?

A. On or about?

Q. Yes.

A. My first dealings with Knetzer were when I went over to his place in June of '47 to buy a car for my brother Dick, who had recently been released from the Army. We were unable to buy a car in St. Louis at a regular price. Mr. Walker, who had worked for Knetzer, who did work for Knetzer, who formerly worked under a cousin of mine at Emerson——This cousin knew we were looking for an automobile, and he recommended that we go to the Knetzer Auto Sales, see Mr. Walker and give his name as a
73 recommendation to get an automobile, which I did with my brother Dick.

Q. Did you meet Mr. Knetzer on that occasion?

A. No. I talked to Mr. Walker.

Q. Did you leave a deposit for an automobile at that time?

A. I wrote my check out for $1300.00 as a deposit for a car, and had him draw a receipt up in my brother Dick's name. I have the receipt and cancelled check with me here.

Q. Do you have them with you?

A. Yes.

The Court: Let me interfere with your line of questioning. I am absolutely unfamiliar with this case, but this was a claim filed before the Referee that we are now hearing?

Mr. Bonjean: That's right.

The Court: And Judge Briggle was a referee?

Mr. Bonjean: Yes.

The Court: In what position am I?

Mr. Bonjean: As the District Court sitting as referee.

74 The Court: Who do you file your certificate for review before? Suppose one would want to appeal from a referee's finding. Where would it go?

Mr. Bonjean: As I understand it, the referee and the court are merged in a proceeding of this kind.

The Court: Is that agreed?

Mr. Horsley: I think it is agreed any appeal here would have to go to the Circuit Court of Appeals.

The Court: I think it should. I don't mind sitting as a referee.

Mr. Bonjean: You are sitting in a dual capacity, in my opinion: As referee merged with the court.

The Court: It's new to me. If I am sitting, I am sitting as a District Court, as you gentlemen all understand it, and as a referee as well?

Mr. Giffin: If this will be any help, this petition, rather than being filed in the District Court, was directed to
75 the judge himself, to Judge Briggle.

The Court: As referee, wouldn't it be?

Mr. Bonjean: He had assumed jurisdiction of this cause as the court sitting in bankruptcy, and took it away from the Referee.

The Court: When the court does that, then he becomes both the court and the referee?

Mr. Horsley: That is the way I understand it. We certainly won't take any advantage of that thing. I believe any appeal would have to lie to the Circuit Court of Appeals from your decision.

The Court: All right.

The Witness: There is the check.

Mr. Bonjean: Please mark this as Petitioner's Exhibit 1 for the purpose of identification—Exhibit 5, and this receipt Exhibit 6.

(Whereupon said documents heretofore referred to were marked Petitioner's Exhibit 5 and Petitioner's Exhibit 6, respectively, for identification.)

Mr. Horsley: One thing I would like the record to
76 show at this time: In addition to this reclamation petition, this man also has a claim pending in bankruptcy for, I believe, $11,300.00.

Mr. Bonjean: That's right.

Mr. Horsley: This hearing today has nothing to do with that claim for $11,300.00.

Mr. Bonjean: We would like to offer this as preliminary because there has been much innuendo and charge in this action of this man knowing about Jaffke's activities and, by innuendo, indicating he was a part of those activities.

We want to show his connection with the Knetzer Motor Sales was innocent, the same as any other creditor who filed a claim in this court.

This is a check for car and tractors.

The Court: And that is the only purpose?

Mr. Bonjean: That is the only purpose.

That should be 7, 8, 9.

(Whereupon said documents heretofore referred to were marked Petitioner's Exhibit 7, Petitioner's Exhibit 8 and Petitioner's Exhibit 9, respectively, for identification.)

77 Q. (By Mr. Bonjean.) I hand you herewith Petitioner's Exhibit number 5, and state to the court what that is.

A. That is the check to Robert L. Knetzer for $1300.00 on June 17, 1947. It's marked as "Deposit for 1947 or 1948 Buick."

Q. Will you state to the court what Exhibit 6 is?

A. This is a receipt dated April 8, 1948, for "Received from Richard Jaffke $1300.00 deposit on '48 Buick to be delivered by April 20, 1948, or money refunded." There is a difference in that date of that receipt and my check, which is accounted for in this way: My original receipt was signed by Mr. Walker, and Knetzer, at the time I put money up on the tractors, called that receipt in and gave me a new one and replaced the one signed by Walker, but it is for the same amount and the same automobile.

Q. After you made this deposit for this automobile, did you have any further dealings at that time with Knetzer Motor Sales or Mr. Knetzer?

A. From somewhere around March of 1948 I was over there to see about delivery on a car. There were several tractors sitting on the floor, and at the time I had an interest in a farm in South Dakota and we had—we were
78 in dire need of equipment, and at that time I was talking to Mr. Walker and asked him about the tractors, and he said yes, they were for sale.

Mr. Horsley: I certainly object to any testimony—

The Court: Objection to conversation is sustained.

A. In other words, I deposited $3,000.00 for three tractors for my own use in South Dakota.

Q. I will hand you herewith Petitioner's Exhibit 9. State what that is.

A. This is a check for the deposit for those three tractors.

Q. Then after that did you have any further dealings with Mr. Knetzer or the Knetzer Motor Sales?

A. In April I deposited $7,000.00 for seven more tractors after Knetzer approached me in St. Louis.

Q. How long before that had he approached you in St. Louis?

A. The day before that evening.

Q. Was the price that you had deposited for these tractors the list price on them or not?

A. They were to sell at the list price, which was
79 approximately $1600.00, $1636.00, somewhere in there more or less.

Q. I hand you herewith Petitioner's Exhibit number 7. State what that is.

A. That is the check for seven thousand to Knetzer Motor Sales for those tractors.

Q. Can you explain to the court what Exhibit 8 is here?

A. 8 is a receipt for ten thousand, which is for the total of the two deposits I made on the tractors, one for seven and one for three. He combined both of them on one receipt.

Q. After that, did you have any further business dealings with Mr. Knetzer prior to his bankruptcy?

A. No, other than to approach me—him—for my equipment or the return of my money.

Q. Did you ever receive the equipment?

A. No, sir.

Q. Did you ever receive a return of your money?

A. Nothing.

Q. How did you learn, if you did, of the bankruptcy of Mr. Knetzer?

A. I was coming home from a fishing trip in Minnesota, stopped at a little town for breakfast, and the St.
80 Louis Morning Globe was laying on the counter.

Q. That was in what year?

A. October of 1948.

Q. And after that did you make any effort to contact Mr. Knetzer or did he contact you about that year?

A. Knetzer didn't contact me, no, but I wrote two letters, one to Manuel Wiseman and Philip Listeman of Alton.

Q. Who were these people?

A. Attorneys whose names I received out of the paper, supposedly representing Mr. Knetzer in this bankruptcy.

Q. What was your purpose in writing him?

A. I wrote those in an attempt to—

Mr. Horsley: Object to what his purpose was. It is self-serving.

The Court: I don't see how he can testify to what he wrote officials. Objection sustained.

Q. Did you employ counsel to represent you at that time?

A. That's correct.

Q. Who did you employ?

A. The firm of Hoffmeister & Gilpin.

Q. Are they a St. Louis law firm?

A. Yes, 1138 Paul Brown Building, St. Louis, Missouri.

81 Q. Had they always represented you in your legal matters?

A. Yes, sir.

Q. What did they do pursuant to your instructions?

A. They filed a formal claim with Mr. Horsley, where the bankruptcy was at that time, and all further correspondence was taken up with my attorneys.

Q. Was that a claim that you filed with the bankruptcy court for the $11,300.00?

A. Correct.

Q. That you had deposited for the vehicles that you have described?

A. Yes.

Q. Did you believe the representations that he made to you as being—

Mr. Horsley: Object as calling for a conclusion.

Mr. Bonjean; I think it is important whether he believed it.

The Court: I think he may answer it.

A. Yes, I did believe it.

88 Q. You may proceed.

A. I went across the street and withdrew—withdrew $2300.00, a collateral account in the Mercantile Trust Company which I could increase or decrease, a collateral account, a high credit of some $40,000.00 which I used up or down as I saw fit, and at that time I didn't have sufficient money in my account so I borrowed the money in my collateral account. It was credited to my account. I issued it to myself, took it over and cashed it and gave it to Mr. Knetzer.

Q. How much?

A. $2300.00.

Q. Did he give you anything?

A. Yes, a receipt to be accounted for, $2300.00 to be accounted for, and signed it "Robert L. Knetzer."

Mr. Horsley: Object unless we have a receipt, the receipt.

Mr. Bonjean: We will explain that it was joined with another receipt at a later date.

Mr. Horsley: I am going to move to strike that.

The Court: It may be stricken.

Mr. Horsley: And I have a particular reason for
89 that motion.

The Court: It may be stricken.

Q. Do you have that receipt?

A. I haven't that particular receipt, no, sir.

Q. Can you account for what has happened to that receipt?

A. Yes, because from time to time he secured additional money from me, and each time he secured additional money the old receipt was destroyed and he would give me a new receipt in full for the entire amount.

Q. In proper time can you produce to the court here receipt for the total amount that he received from you?

A. Yes.

Mr. Bonjean: I am leading up to that. That is the reason I didn't offer the receipt at this time.

Mr. Horsley: The first payment was $2300.00?

Mr. Bonjean: $2300.00.

Q. What was the date of that payment?

A. December 7.

Q. When was the next time you made a payment to him?

A. About two hours later the same date.

Q. Tell the circumstances of that.

90 A. I took the first payment with me and went up to an office of a man named John Snyder. He represented Mr. Snyder as being his accountant and tax man and also interested in this particular deal. Knetzer himself went into the office of Mr. Snyder, and I stayed outside in the waiting room, and after some time, supposedly twenty minutes or so, he came back out and we went downstairs, and he said that Snyder had given him some bad news. I said, "Now what?" He said the court was requiring a payment of $5000.00 which would have to be paid at once.

Q. Did he tell you what the nature of that payment was?

A. This is the collateral note I signed for the $2000.00 shortly before I drew a check for $2300.00.

Q. On what date?

A. December 7, 1950.

Q. And then I hand you herewith Petitioner's Exhibit 15. State what that is.

A. That's a collateral note on the same bank, on December 7, 1950, for thirty-five hundred.

Q. Was that a withdrawal?

A. That's a collateral note.

Q. Are those—Is that—The money you got on those notes, did you write checks?

A. I wrote a check against each one, yes, sir.

Q. I hand you herewith Petitioner's Exhibit 11. State what that is.

A. That's a check for thirty-eight hundred that I wrote against the collateral loan for thirty-five hundred.

94 Q. Here is Petitioner's Exhibit 12. State what that is.

A. This is a check for $2300.00 which I wrote against the collateral loan of $2000.00.

Q. What did you receive for the checks, 11 and 12?

Mr. Horsley: Object in addition to the other reasons given, it's purely a self-serving statement on the part of the petitioner.

The Court: He may answer. Objection overruled.

A. The money was given to Mr. Knetzer.

Q. Was it by check or cash?

A. By cash, cashed at the bank and taken and given to Mr. Knetzer.

Q. Here is Petitioner's Exhibit 13. State what that is.

A. That's my banking statement for December of 1950, shows the two collateral —

Mr. Horsley: I object.

Mr. Bonjean: It speaks for itself.

The Court: Yes.

Q. Did you see Mr. Knetzer—When is the next time you saw him after that, if you did?

A. I saw or heard from him from time to time, almost every day, whether it would be for a couple of minutes or just a short call, to assure me everything was going along all right.

Q. On what?

A. On the deal, everything was progressing.

Q. What year was this in you are talking about now?

A. This was December, 1950.

Q. 1950, and each time you saw him day by day was he ever in any person's custody or accompanied by anyone?

A. At no time.

Q. Did you have any other financial dealings with him during the month of December, 1949? 1950?

A. Sometime the 10th, 11th or 12th of December Mr. Knetzer had me meet him at the airport, and at that time he had another man with him and introduced this man as another member of the corporation, and named him as being Mr. Ralph Riley.

Q. Is he in this court room today?

A. Mr. Riley is here.

Q. Is he in the room at the present time?

A. He just stepped out.

Q. Is he the same Mr. Riley who had a —

A. Same party.

96 Q. And had you ever met Mr. Ralph Riley before this time?

A. No, sir, I hadn't.

Q. You met him on what date for the first time?

A. I couldn't be sure of that. Mr. Riley might know. But somewhere from the 10th, 11th or 12th of December of 1950. I was called from my home to meet Mr. Knetzer at the airport, and he had this man with him. He had previously given me the name of Riley as being a member of the corporation, and I think he just wanted me to meet him.

Q. Did you meet him?

A. Mr. Riley, yes, sir.

Q. Did you have any conversation with him?

A. No, other than the normal conversation.

Q. Just greeted him? Just met him?

A. Yes.

Q. Did you have any conversation at that time with Mr. Knetzer?

A. Mr. Knetzer took me into the coffee shop for a cup of coffee and left Mr. Riley by himself, and had a few minutes' conversation with me about Mr. Riley being the man that was heavily invested in this corporation, and was on some paper, some of the paper, and knew what it was
97 all about. We then came out of the coffee shop, went back to where Mr. Riley was going, Mr. Knetzer escorting Mr. Riley out. I got in my car and come back home.

Q. Did you have any further meetings with Mr. Knetzer after that?

A. Yes.

Q. What was that? Give the date, the date and the place.

A. I don't know the date but it was before the 13th of December because he then approached me for more money on this project.

Q. What did he say that he needed the money for, if he did?

A. From time to time he used various reasons, but on this particular one I think they were needing additional assets to show in the corporation for — to get the approval of this loan; in other words, the corporation had to show something as being money on hand to get a loan approved of any size.

Mr. Horsley: I want to make at this time the further objection and move to strike on the ground that this is conversation had after bankruptcy, is a conversation
98 had after the title to some money has supposedly passed to the trustee, and is in derogation of that title, contrary to all of the rules of evidence that a bankrupt cannot testify in derogation of the trustee's title after the title has passed to the trustee.

Mr. Bonjean: This money was paid all during the year 1951.

The Court: I think the motion will be overruled. He may answer. I am perfectly willing to listen to these objections after it is over.

Mr. Horsley: May I have it as a running objection at this time?

Mr. Bonjean: We understand that.

Mr. Horsley: And a running motion to strike?

Mr. Bonjean: That's all right.

The Court: Yes.

Q. How much did he say he needed?

A. Twelve thousand five hundred.

Q. Did you consult anybody as to the advisability of putting further money in this business?

99 A. Before I put any money in the bank, I approached my brother.

Q. Is your brother here?

A. Yes, he is here.

Q. Is that he sitting here (indicating)?

A. Yes.

Q. What business is your brother in?

A. He is vice president in the real estate department of the Mercantile Trust Company.

Q. Of what? Where is the Mercantile Trust Company?

A. St. Louis, Missouri.

Q. You did consult with him, you say?

A. That's right.

Q. What did you do pursuant to this demand of Knetzer for $12,500.00?

Mr. Horsley: I don't believe there was any demand.

Q. Did you testify he asked for $12,500.00?

A. Yes.

The Court: "Requested it," I think he said.

Q. Go ahead.

A. I approached one of my loan clients, and asked him if he could help me out.

Q. Who is that loan client?

100 E. B. Dierkes.

Q. Is he here today?

A. Yes. 3648 Meramec Street.

Q. What kind of business did you handle for Mr. Dierkes?

A. Investments, deeds of trust, mortgages and insurance.

Q. Tell the court what you did with respect to the $12,500.00.

A. I told Mr. Dierkes I was interested in a project and needed some help, and if he wanted to give it to me.

Mr. Horsley: I will object to this witness's testimony —

Q. Did you obtain the $12,5000.00?

A. I obtained $12,500.00.

Q. From whom?

A. From Mr. Dierkes, E. B. Dierkes.

Q. How did he secure it?

A. He secured it from his bank in cash and gave it to me in cash.

Q. What did you do with that cash?

A. I turned it over to Mr. Robert Knetzer.

Q. On what date?

A. On the 13th of December, 1950.

Q. For what purpose did you deliver it to him?

101 A. For the purpose of consummating our deal for the Bison Mining & Development Company.

Q. When after that did you again have any business dealings with Mr. Knetzer, if any?

A. Do you want this (indicating document)?

Mr. Bonjean: Mark that as the last exhibit.

The Clerk: 14.

(Whereupon said document heretofore referred to was marked Petitioner's Exhibit 14 for identification.)

Mr. Bonjean: Will you mark this Exhibit 15, 16, 17 and 18?

(Whereupon said documents heretofore referred to were marked Petitioner's Exhibit 15, Petitioner's Exhibit 16, Petitioner's Exhibit 17 and Petitioner's Exhibit 18, respectively, for identification.)

Mr. Bonjean: We will withdraw Exhibit—Combine 16 and 17. Just withdraw 17.

The Clerk: Then this will be 17.

Q. I hand you herewith Petitioner's Exhibit 14, which appears to be a series of checks. Will you tell the court what those checks are for?

A. These checks from January 31, 1951, through June 29, 1954, of which there must be thirty of them are for—

Q. Who are they payable to?

A. Payable all to E. B. Dierkes, and are for interest and principal payments on the indebtedness of twelve thousand five hundred which I secured from him.

Q. Which you testified to?

A. Yes.

Mr. Horsley: I don't see the materiality.

Mr. Bonjean: It just verifies this man's statement about this loan.

The Court: Doesn't it show his loan?

Mr. Bonjean: These other instrments show the loan, but we want to bring all the evidence that had any probative value. This is the principal, this is the entire repayment of that loan.

The Court: Just the record of that loan?

Mr. Bonjean: Yes.

The Court: They aren't offered yet. Go ahead.

Q. I hand you Petitioner's Exhibit 16. State what that is.

A. That is the collateral note which I gave to Mr. Dierkes. It calls for the sum of $13,000.00, which was $12,500.00 for the principal and five hundred for the commission for the loan, and dated December 13, 1950.

Q. And is that the note that you gave him to represent the indebtedness of $12,500.00 that you borrowed from him that day?

A. Yes, and it lists the collateral which I gave him for this loan.

Q. And Petitioner's Exhibit 15, will you identify that?

A. This is a copy or duplicate, you might say, of the collateral note. This is a personal note signed by me in addition to the collateral note to Mr. Dierkes.

Q. For that same loan?

A. Same amount and same loan.

Q. Will you identify for the court Petitioner's Exhibit 17?

A. That is a duplicate of a bank deposit, which only shows that when some of the collateral was removed from Mr. Dierkes and sold to another party Mr. Dierkes received that certain principal on that same date.

Q. It shows payment of that loan?

A. That's right. $2500.00. The check is there.

Q. When was the next time after that you had any
104 business dealings with Mr. Knetzer, if any?

A. On the 18th of December, 1950.

Q. Where did that take place? If you met with him, tell the court what happened.

A. I met the day before and he again needed more money.

Q. Tell the circumstances of that meeting, and what was said between you at that time.

A. This time the loan was going slower than they figured on, there had been some notes issued on an option of some kind against the ground they were going to use for the building of these houses, and a note was due and had to be picked up and paid or the transaction might fall apart if the ground itself that they were figuring on was lost, and $7500.00 had to be paid on this note at that time.

That conversation was on the 17th of December.

Q. On each of these occasions, prior occasions, that you have testified to, did you receive receipts from Knetzer for the amount of money that you gave him?

A. Yes, each time he called in my old receipt and gave me a new one for the full amount he owed me.

Q. Tell the court what transpired this last time that you met him.

105 A. Well, I met Mr. Riley—

Mr. Horsley: What date are you referring to?

Q. December 18?

A. I met Mr. Riley around the 10th or the 12th.

Q. What Riley is that?

A. Ralph Riley, and I understood he was—

Q. Where did you meet him?

Mr. Horsley: Object to what you understood.

The Court: Yes. Where did you meet him?

Q. Where did you meet him?

A. I met Mr. Riley at the airport.

Q. Then did you—

A. So to satisfy myself—

Mr. Horsley: On the 18th?

Q. On the 18th what did you do, if anything?

A. On the 18th of December before giving Mr. Knetzer any additional money—

Q. Did he ask for additional money on the 17th?

A. Yes, seventy-five hundred.

Q. What did you do?

A. I phoned Mr. Riley person to person at a business in Hampton, Iowa, told him who I was and asked if
106 he remembered me. He said, "Yes, you are the man I met at the airport the other morning." I said, "The reason I am calling, Mr. Riley, is this fellow Knetzer is calling for some more money on this transaction, and I wanted to talk to you before I gave it to him." I said, "He gave me to understand that you were heavily invested in this deal." Mr. Riley informed me at that time that he thought it was a good deal and a big deal, and that he had considerable of his money in it.

Q. Then what did you do after that?

A. After that conversation I received the money from other loan clients.

Q. Who are they?

A. Miss Ida—

Mr. Horsley: I don't think it is material to go over this.

The Court: I think he can show where he got the money, but cut it down.

A. I borrowed the $550.00 from Miss Ida Wurst, 3724 Utah Street.

Q. St. Louis?

A. St. Louis, Missouri.

107 Q. Did you give her any security for that?

A. My personal note, that's all.

Q. Where did you get the rest of the seventy-five hundred, if you did?

A. I borrowed some money along in there from my brother, borrowing at the bank.

Q. Is he the brother in the bank today?

A. That's right, $2500.00 from William Jaffke, and I gave him my receipt for it.

Q. What did you do with this money then?

A. I turned that money over to Robert Knetzer.

Q. On what date?

A. On the 18th of December.

Q. For what purpose?

A. For the purpose of picking up this note, paying this note that was due against the option on this ground for the building of these homes they were—

Q. Then did you have any further business dealings with Mr. Knetzer after that?

A. On the 22nd of December I advanced $9,000.00 more to him on that transaction.

Q. State the circumstances of that.

A. A day or two previous to that he approached
108 me again that the loan was being held up for the purposes of additional assets and legal expenses and expenses for their influence man that was fronting for the loan, so I borrowed that money.

Q. Did you believe all these representations that you said Mr. Knetzer made to you?

Mr. Horsley: Object to that.

The Court: He may answer.

A. Certainly. I went out and borrowed the money.

Q. Proceed.

A. I borrowed the money from a Mrs. Laura Downing.

Q. Where does she live?

A. 6322 Potomac Street.

Q. St. Louis?

A. Yes.

Q. How much did you borrow from her?

A. $5500.00 from Laura Downing.

Q. Did you borrow anything else?

A. I gave Mrs. Downing a second deed of trust on a piece of property I owned on Magnolia.

Q. Do you have that deed of trust with you?

A. Yes, sir.

Q. You may continue.

109 A. Mrs. Downing gave me the $5500.00 on the presentation of that deed of trust on Magnolia single

flat. Additional money, I received twenty-five hundred from George Paul, 6324 Wenona.

Q. Who are these people, Mrs. Downing and Mr. Paul?

A. Mrs. Downing is one of my loan clients. Mr. Paul is an uncle to my wife. Here is Mr. Paul's check. Mr. Paul's loan was temporary because he had a mortgage due in a few days or a few weeks. He said I could use his money until his mortgage was due and, when the mortgage came due, to pay it off for him, which I did.

Q. This is—I hand you Petitioner's Exhibit 18. State what that is.

A. That is the $5500.00 note.

Q. To whom?

A. To Laura Downing, dated December 21, 1951, on 3439 Magnolia.

Q. Petitioner's Exhibit 19, state what that is.

A. That is the deed of trust that the note is secured by on the same property.

Q. I hand you Petitioner's Exhibit 20. State what that is.

110 A. It's a cancelled check payable to me from George Paul for twenty-five hundred on December 20, 1950, endorsed by me and cashed at his bank.

Q. What did you do with the money that you got? This $9,000.00?

A. I gave that to Mr. Knetzer.

Mr. Horsley: Is that December 22?

The Witness: Yes, sir.

Q. You said you got $5500.00 from one party and twenty-five hundred from Mr. Paul. Did you obtain another loan at that time?

A. I believe that's all. I had some carried over from farther up where I gave him seventy-five hundred. I had borrowed eight thousand, and I had some additional money from that, and I made that up from the other money I had.

Q. Did you ever borrow any money from Mr. C. L. Miller?

A. I borrowed money from Mr. C. L. Miller on the 3rd of January, 1951, $2,000.00.

Q. What did you do with that money? This $9,000.00 that you obtained?

A. That $9,000.00 was given to Robert L. Knetzer.

Q. On what date?

111 A. On the 22nd of December, 1950.

Q. For what purpose?

A. For the transaction of securing —

Mr. Horsley: I think this is a conclusion.

Mr. Bonjean: He gave it to him for a purpose.

The Court: I think he covered it. Oh, he may answer.

A. For the purpose of completing our transaction of securing the RFC loan and this contract to this building.

Q. To further that business he had described to you?

A. That is correct.

Q. Did he give you a receipt for that?

A. That's right. He increased the receipt that I had been holding.

Q. To reflect the new $9,000.00 loan?

A. Yes.

Q. When, if any time, after that did you have any other further business dealings with Mr. Knetzer? Give the place and time.

A. On the 3rd of January.

Q. Of what year?

A. 1951. I advanced $6,000.00 to Mr. Knetzer.

112 Q. And state the circumstances of that to the court. 3rd of January, '51, is that right?

A. That's correct: I borrowed $550.00 of this from Mary Boka, 3319 Chippewa Street. Miss Boka is a loan client. And two thousand was made up in two checks from C. L. Miller, an uncle of mine.

Q. Do you have those?

A. There is Mr. Miller's cancelled checks.

Mr. Bonjean: Mark that, please, 21 and 22. (Whereupon said documents heretofore referred to were marked Petitioner's Exhibit 21 and Petitioner's Exhibit 22, respectively, for identification.)

A. That is Mr. Miller's wife. She signs her name—

Q. State what Exhibit 21 is.

A. This is a check for $1,000.00 from C. L. Miller to myself.

Q. Covering the loan that you obtained from him that you have described?

A. On December 29, 1950.

Q. State what Petitioner's Exhibit 22 is.

A. That's a check from Mrs. Miller for a thousand dollars, payable to myself, for a loan.

Q. Did that cover the balance of that loan you
113 said you made from Millers?

A. That covers the loan.

Q. Did you obtain any other loans at that time?

A. Mrs. Clara Wills also advanced $2500.00 to me, but I didn't get that check until several days later, but she was in the same transaction with her aunt, Miss Boka. It was an aunt and a niece. Those two ladies, I gave them an $8.000.00 mortgage on an eight-family apartment that I own in St. Louis.

Q. Do you have that mortgage here?

A. Yes.

Mr. Bonjean: Mark that 23, please. (Whereupon said document heretofore referred to was marked Petitioner's Exhibit 23 for identification.)

Q. I hand you herewith Petitioner's Exhibit 23. State what that is.

A. It's a deed of trust signed by my wife and myself, payable to Mary Boka and Clara B. Wills.

Q. In what amount?

A. For $8,000.00 for money borrowed on January 2, 1951.

Q. What did you do with that money? That $8,000.00?

A. That money was turned over — $6,000.00 of that money was turned over to Robert Knetzer.

114 Q. Six thousand of it?

A. Yes.

Q. What was the circumstance of that turning over?

A. Needing more money on the transaction.

Mr. Horsley: I object to this. It's just a conclusion.

The Court: Yes. If you want it detailed—What was said?

Q. Tell what was said.

A. There was again additional money needed in the assets of the corporation for the approval of the loan.

Q. Did he give you a receipt for that?

A. No, I didn't get a receipt for that until a later date.

Q. Did you later get one?

A. That's right.

Q. You have that receipt with you that you will produce in due time?

A. Correct.

Q. Was there any time after that you had any further business dealings with Mr. Knetzer?

A. On the 8th of January he got a thousand dollars from me.

115 Tell the court the circumstances of that.

A. He needed additional money for attorneys' fees and such.

Q. Attorneys' fees for what? Did he tell you?

A. For transactions of the Bison Development Company which we had. I secured that money from Adolph Bohn.

Q. Who is Adolph Bohn?

A. Bohn is a pawnbroker and a client of the Hoffmeister, Tralles & Gilpin law firm.

Q. Did you give him any collateral to secure that loan?

A. Mr. Bohn took my receipts.

Q. What did you do with that money?

A. That money was turned over to Robert Knetzer.

Q. When? What date?

A. January 8, 1951.

Q. For what purpose?

A. For legal purposes for the Bison Mining & Development Company.

Q. Did you believe the representations he made to you at that time?

A. Correct.

Q. And on each of these occasions you have testified to?

A. Yes.

116 Mr. Horsley. Same objection as previously.

The Court: I understand.

Q. Did you give Mr. Knetzer any further money for the purposes of this Bison corporation?

Mr. Horsley: I want to object. It is leading and suggestive.

Mr. Bonjean: I will strike that question.

Q. Did you then have any further meetings with Mr. Knetzer?

The Court: I think we will take a recess.

(Recess.)

Mr. Bonjean: We have a police officer that needs to return to the county jail. We need him for the purpose of identifying an exhibit.

The Court: Do you have any objection?

Mr. Horsley: I have an objection to what he is going to testify to.

The Court: All right. You may swear the witness.

Mr. Bonjean: Will you please mark this Petitioner's Exhibit 24?

(Whereupon said document heretofore referred to was marked Petitioner's Exhibit 24 for identification.)

117 The Court: Swear the witness.

Mr. Horsley: Before we go ahead, if you expect to call Mr. Dunham as an adverse witness, would there be any chance of doing it today? He informs me he has to be in court tomorrow.

Mr. Bonjean: We do expect to call him. We will do our best.

The Court: We will try and arrange it for Mr. Dunham some way.

Mr. Horsley: It will be almost impossible for him to be here tomorrow.

RUSSELL WILSON, called as a witness on behalf of the petitioner, and having been first duly sworn, testified as follows, in answer to Direct Examination by Mr. Bonjean:

Q. Will you state your name?

A. Russell Wilson.

118 Q. Where do you live?

A. 516 West Kennedy here in Springfield.

Q. What is your business or occupation?

A. I am a detective sergeant, Springfield police department.

Q. How long have you been with the police department?

A. Seventeen and a half years.

Q. I hand you herewith an instrument marked for identification Petitioner's Exhibit 24, and ask you whether or not your name appears on that instrument as a notary public.

A. It does, sir.

Q. And do you recognize the other signature on that instrument?

A. Yes, sir.

Q. Whose signature is that?

A. Robert L. Knetzer.

Q. Did you see him sign this instrument?

A. I did.

Q. Did you swear him to the truth of the contents at the time that you notarized it?

A. I did.

Q. Can you tell us who all was present at that time?

119 A. There was a fellow who I understand was his attorney and his wife.

Q. Do you know who his attorney was?

A. I don't remember the name now.

Q. Was it signed by him on the date that the instrument bears?

A. That's right, sir. That's the one.

Mr. Bonjean: That's all.

The Court: Any cross examination?

Cross-Examination by Mr. Horsley

Q. Was Mr. Jaffke there present in the outer part of the jail that day?

A. Not to my knowledge, Mr. Horsley.

Q. You don't know the attorney's name?

A. I don't know his name.

Q. Had this affidavit been prepared and brought into the jail?

A. That's right, as far as I know.

Q. You didn't prepare the affidavit?

A. I had nothing to do with that.

Q. Were you the jailer on duty at that time?

A. No, I was a lieutenant in the office of the chief

120 of police. They came and asked me if I would acknowledge the signature. I was a notary public.

Q. And you came back?

Mr. Giffin: These payments were made after bankruptcy.

The Court: He said he thought he had. It may stand.

Q. What did Mr. Knetzer say?

Mr. Horsley: I object to that.

The Court: Objection sustained. I don't think it made any difference if he testified he borrowed some money.

Mr. Bonjean: I think the evidence will show he was in court when Mr. Knetzer testified he borrowed money
145 from Jaffke.

The Court: I don't think it would be material if he did.

Mr. Horsley: I don't think there is any such testimony in this record.

Mr. Giffin: We have a transcript.

Mr. Horsley: Not at any creditors' meeting.

Mr. Giffin: We have a transcript of hearing in the bankruptcy of Judge Briggle March 11, 1953, at which were present Mr. Doyle, Mr. Alexander, the marshal or the acting marshal at that time.

Mr. Knetzer was put under oath, and Mr. Horsley was present as attorney for the trustee, at which time Mr. Knetzer was interrogated under oath regarding his borrowings from different people, and he testified at that time that he borrowed from Jaffke over $40,000.00.

He testified at that time. I think this is admissible as a record of this court with all the parties present, and it is admissible in this proceedings.

146 The Court: It may be true. If it is, I ask him—

Mr. Giffin: May I offer this?

The Court: I am not sure it is permissible, but no use asking him if it was a court proceeding.

Mr. Horsley: It shows on the face he wasn't present at that proceeding.

The Court: Who?

A. Yes.

Mr. Bonjean: Just one more question.

Re-Direct Examination by Mr. Bonjean

Q. Where was Mr. Knetzer at that time?

A. He was in the prison in the federal section. The keeper got him over and brought him over to the table in the lobby of the prison.

Q. What prison is that?

A. The city prison.

Mr. Bonjean: That's all at this time.

(Discussion off the record.)

121 WILLIAM C. DUNHAM, called as an adverse witness on behalf of the petitioner, and having been first duly sworn, testified as follows in answer to Examination by Mr. Bonjean:

Q. State your name.

A. William C. Dunham.

Mr. Bonjean: It's understood, if the court please, he is called under the section providing for the calling of an adverse party.

The Court: That's right.

Q. You are the trustee in bankruptcy of the Robert L. Knetzer estate?

A. I am.

Q. When were you appointed such trustee?

A. Trustee of Knetzer Motor Sales Company on December 3, 1948, and trustee of the Robert L. Knetzer estate on December 10, 1948.

Q. Both those proceedings are now consolidated.

A. They are.

Q. What is the number? The consolidated proceeding?

Mr. Horsley: The trustee.

The Court: Objection sustained as to what that testimony was. Let's get along, gentlemen.

Q. Did you ever meet Mr. Jaffke, Mr. Dunham?

A. I met him. Yes, I met Mr. Jaffke.

Q. When did you meet Mr. Jaffke?

A. I don't remember the first time.

Q. It was subsequent to the period from October of 1950 to October of 1952, was it not? 1951, was is not?

A. Oh, I think so, yes.

Q. Mr. Dunham, just one question: Did Mr. Knetzer ever tell you that he was engaged in business activities in an effort to pay off this turnover order?

147 Mr. Horsley: I object to that as being immaterial to impeach the turnover order. That would be an impeachment.

Mr. Bonjean: It is corroborative of our position.

The Court: It isn't corroborative, what he would say about it, I don't think. Objection sustained.

Q. Did you at any time in your official capacity as trustee and receiver of the payments on the turnover order ever have any moneys turned over to you that he referred — that you referred to the Federal Bureau of Investigation as being concealed assets or being money that had been buried or something?

Mr. Horsley: I object to that. Object to that. It's immaterial as to what he did.

The Court: What would that have to do with it if it was concealed and was buried? I don't see what it would have to do with it. Objection sustained.

148 Q. Did you ever have any evidence come to your attention during this period of payments by the bankrupt that you knew to be money that he had concealed from his trustee?

122 A. 11789.

Q. And you are still acting as such trustee, are you not?

A. I am.

Q. Now, will you tell the court whether or not you received any money from Robert L. Knetzer during the period from December 7, 1950, to November 1, 1951?

A. On the turnover order?

Q. Yes.

A. On December 8, 1950, I was paid—There was paid to Mr. Horsley by Mr. Knetzer $5,000.00, which Mr. Horsley deposited to my account. December 13 Robert L. Knetzer paid to me in currency $3500.00. December 22 Robert L. Knetzer to Horsley $1500.00. I didn't get your date in January.

Q. In January? Did he pay anything in January of 1951?

A. He did not.

Q. Do you know whether he was in jail during the time that he made these payments to you that you have described in December of 1950?

A. He wasn't when he—Are you drawing a distinction between actual and technical confinement?

Q. Yes. I mean where did you receive this money from him?

123 A. The payment made to me was made at my office, so far as I know. That is the December 13 payment.

Q. Was he in anyone's custody at that time?

A. Not as far as I know. That is, actual custody. He came in my office alone.

Q. Do you know when and if during the year of '51 he was confined in jail custody?

A. I do not.

Mr. Giffin: Would it be all right if I took over this examination? Would you have any objection, Bill?

Mr. Horsley: I don't object.

The Court: Go ahead.

Examination continued by Mr. Giffin

Q. Mr. Dunham, to refresh your recollection, do you have any knowledge as to whether or not or did you know at the time whether or not Robert L. Knetzer was confined to jail on or about January 9, 1951?

A. That I don't recall, the date, no. January 9, '51?

Q. Yes.

A. I don't know.

Q. It could very well be he was reconfined to jail 124 at that time?

A. It could very well be.

Q. And directing your attention to the date of April 9, 1951, had you seen Robert L. Knetzer from December 22 to April 9, 1951?

A. I don't recall that I did or didn't.

Q. Did you see him on April 9?

A. No, sir.

Q. Did you receive a payment at that time under the turnover order?

A. Mr. Horsley received a payment on that date of $5,000.00, according to my record.

Q. Do you know who paid Mr. Horsley that money?

A. Not of my own knowledge. My record shows Robert L. Knetzer.

Q. And on April 8, 1951, approximately two weeks later, —

Mr. Bonjean: 18th.

Q. —18th, 1951, did you receive a payment at that time?

A. The next payment I received was April 14.

Q. April 14?

A. April 14 and then April 19.

Q. On April 14 who made that payment?

A. Sol E. Cohn of St. Louis.

125 Q. Who did he make it to?

A. To me, in the form of a cashier's check.

Mr. Horsley: How about the 14th? Is that the 14th or 19th you are talking about?

The Witness: April 9.

Q. April 9 was the payment to you?

A. April 14.

Q. April 14 you received a payment, is that right?

A. Yes.

Mr. Horsley: Was that the Cohn cashier's check? I am confused on it.

A. On April 14 Sol E. Cohn paid me by a cashier's check number 194276. It was paid to one of my secretaries. She doesn't show the bank on which it was drawn, but I am sure it was the Union National Bank for $5,000.00.

Q. What were the circumstances, Mr. Dunham, in regard to Mr. Cohn making that payment?

A. Mr. Cohn came to me and said that he would —

Mr. Horsley: I object to any conversation with Cohn.

The Court: Sustained.

126 Q. Let me ask you this, Mr. Dunham: Was Mr. Cohn authorized to make payments?

Mr. Horsley: Object to that. That calls for a conclusion.

The Court: Objection sustained as to that.

Q. At the time the payment was made, did Mr. Cohn tell you where he got the money?

Mr. Horsley: Object to that.

A. No, sir.

Mr. Horsley: Pure hearsay.

The Court: Objection sustained.

Q. Tell the court how come you accepted money from Mr. Cohn?

Mr. Horsley: Object to that.

The Court: Objection sustained. I can't think it is material. Mr. Cohn paid it to this account, is that right?

The Witness: That's true.

Q. Did he make a representation that he was an attorney?

A. I knew that.

Q. Did he say as to who he was representing?

127 Mr. Horsley: Same objection.

The Court: I think he can say who he was representing in that particular transaction, if he did say so.

A. He did not tell me who he was representing.

Q. Did you have knowledge at that time that he was acting as attorney for Mr. Knetzer?

A. He told me that he would make these payments for Knetzer's account.

Q. On April 19 did you receive another payment from Mr. Cohn?

A. I did, of $5,000.00, Union National Bank draft number 194351.

Q. On April 23—

A. Cashier's check also.

Q. Did you receive a payment on April 23?

A. April 23, payment of $5,000.00.

Q. And who made that payment?

A. Sol E. Cohn.

Q. When was the next payment you received, Mr. Dunham, on the turnover order?

A. I think the payment was actually made on the 30th of April and deposited on May 1. Sol E. Cohn, $5,000.00.

128 Q. When was your next payment?

A. Actually made on May 7, 1951, deposited on May 8, 1951, $5,000.00, paid by Sol E. Cohn.

Q. Then your next payment?

A. May 10, Sol E. Cohn, $5,000.00, deposited on May 11, cashier's check 194700, Union National Bank.

Mr. Horsley: How much?

The Witness: $5,000.00.

Q. And your next payment, Mr. Dunham?

A. May 21, $5,923.72, Sol E. Cohn. I don't show on the receipt, but every payment Mr. Cohn made to me was by cashier's check or draft, no currency, no cash.

Q. When was your next payment from Mr. Cohn?

A. May 24, $5,000.00.

Q. Was it made by the same person?

A. Same way. I don't show on the receipts— Some of these payments were made to the girls in the office, and they gave the receipt and accepted the payment.

Q. Go ahead.

A. May 29, $5,000.00, Sol E. Cohn; June 4, $5,000.00, Sol E. Cohn. October 11, Sol E. Cohn, $5,000.00. October 21, Sol E. Cohn, $5,000.00. Those were all the payments made by Mr. Cohn.

129 Q. When was the next payment received, Mr. Dunham, under the turnover order?

A. November 13, 1951.

Q. And who made that payment? Do you know?

A. A man by the name of Rex Rhoades.

Q. Who was Mr. Rex Rhoades, if you know?

A. He was a man from Lander, Wyoming, he said.

Q. Did you see Mr. Knetzer at that time?

A. I think so. I think Mr. Knetzer brought Mr. Rhoades in.

Q. Did Mr. Knetzer introduce you to Mr. Rhoades?

A. I am not quite positive about that. He and Rhoades were in my office together on one or more — several occasions that Rhoades was there that Knetzer was with him.

Q. Then when was your next payment received?

A. November 14, the next day, $1,000.00. These were all paid by Rex Rhoades. The next November 15, $1,000.00. November 16, $1,000.00. November 19 —

Q. Were these all made by Mr. Rhoades?

A. Yes.

Q. Did Mr. Rhoades come in personally and deliver this money each time?

A. To start, at least, then he made a trip to New
130 York, said he was going there, and he may have wired it or said it.

Q. Each time Mr. Rhoades came there, was Mr. Knetzer in his company?

A. No, I wouldn't say that.

Q. They were together on different occasions?

A. That's true.

Q. At that time did Mr. Knetzer indicate to you any business connected with Mr. Rhoades so far as it pertained to his business activity?

A. He did.

Q. What did he tell you, if anything?

Mr. Horsley: I want to object to any conversation, a stranger to this proceeding.

Mr. Giffin: It involves the business transactions of the bankrupt if he was making these payments on the turnover order.

Mr. Horsley: No showing of any connection with Jaffke.

The Court: You are asking him what? To tell what he said about his connection with him?

131 Mr. Giffin: With the bankrupt. The man was making payments on the turnover order.

The Court: I think he may answer. What did he say? We can strike it. Just as short as you can.

A. Mr. Knetzer was supposed — I think this is the Teapot Dome deal, had some ground by which he could be permitted to drill oil wells in the Teapot Dome, had gotten it through the Navy Department or could get it if he had the time to work on it, and Mr. Rhoades was interested to an extent that he, Rhoades, was going to go to New York and sell out an oil field that he had, a producing field, in western Nebraska. Rhoades did leave. I didn't see him for a few days, then I didn't see him at all.

Q. Mr. Dunham, did Mr. Knetzezr indicate that he was borrowing — why Mr. Rhoades was making these payments for him?

A. Mr. Knetzer at that time —

Mr. Horsley: I want to object.

The Court: Presence of one another or what?

Mr. Giffiin: They were in the presence of one another.

132 The Court: Were they?

A. I don't think anything was said—Knetzer owed this money under this order, and Rhoades said that he was making the payments for him. I don't think we set down and mapped it out. He said he would be responsible for a thousand dollars a day or $5,000.00 a week, it amounted to.

The Court: Let's get along.

Q. Directing your attention to about April 13, 1950, were you present in Springfield at a hearing, a creditors' meeting, in this bankruptcy?

A. I assume I was. I don't remember the date. I was here a good many times.

Q. Does the name Sanderson mean anything to you?

A. Sanderson?

Q. Yes.

A. It does not.

Q. Dr. Sanderson, does that name mean anything to you?

A. From Edwardsville?

Q. Yes.

A. I remember there was a Sanderson.

Q. Do you remember he testified in the creditor's meeting under oath in which you were present here in Springfield?

133 A. I think he did.

Q. And he testified regarding a loan to the bankrupt, Robert L. Knetzer?

Mr. Horsley: I want to object, no materiality in this case whatever.

The Court: I don't see any. Where is it?

Mr. Giffin: If the court please, the issue in this case is title to this money, whether it be in the doctor.

The Court: That might be true, but what has that to do with Dr. Sanderson?

Mr. Giffin: In the creditors' meeting it was—there was testimony of loans to Knetzer that came into the turnover order as far back as 1950, which were—which would put the trustee on notice of the borrowings of these moneys.

The Court: No, objection sustained to that.

Q. Mr. Dunham, at that time did you hear in the court room stories about Knetzer's scheme and efforts to obtain money from different parties in that creditors' meeting?

Mr. Horsley: I object, object to that.

134 The Court: I can't see where that is material at all, whether somebody else may or may not have loaned anything to him. The rumors and stories going around would lead a man to believe anything. Objection sustained. I can't think it is material.

Q. Did you at any time, Mr. Dunham, request of the court by yourself or through your attorney to have Mr. Knetzer released from jail in order that he might obtain money to pay in under this turnover order?

A. I wouldn't say that I requested it. Mr. Knetzer came to me on many occasions when he was out of jail, and when he had promised to make payments on the turnover order at some definite time, and asked—would ask me to call either Mr. Horsley or, in some instances, Judge Briggle direct, to be permitted to have additional time. I did that on several occasions.

Q. During that time would you know whether or not he was in jail or out of jail?

A. On those occasions that he was in my office at East St. Louis.

Q. But you didn't have personal knowledge of when he was confined in jail pursuant to this contempt order
135 or when he was outside jail?

A. I don't remember just now when he was first incarcerated, but I knew from time to time that he had been in and was out and back in again, yes. He came to see me quite often, too often, in fact.

Q. On those occasions would he tell you about those business ventures?

A. He told me on some of those occasions, yes.

Q. Did he mention the Bison Development Company?

A. I never heard of it. He mentioned a name but I didn't know the name until here.

Q. He did mention he was connected with a corporation?

A. Yes, he said a corporation was being formed to deal in timber, oil, Christmas trees, and he showed me, without permitting me to see any signatures, what purported to be a lease or an option or something of that kind.

Q. And that was during the period from October of 1950 through October of 1951, was it not?

A. I cannot answer.

Q. As best you recollect?

A. I wouldn't say it wasn't. I don't remember.

136 Q. If you know, Mr. Dunham, tell the court here how come these extensions on the payment of the turnover order were permitted the bankrupt.

Mr. Horsley: Object to that, not material.

The Court: Objection sustained.

Mr. Giffin: I think it is very material.

The Court: Objection sustained. I don't think it was at all. That was the court's order and he was released from jail. I don't think I am concerned with that.

Mr. Giffin: I am developing there was an order entered to turn over $250,000.00.

The Court: The order is in evidence.

Q. Was any reason given to you during this period from October of 1950 to October of '51 why the bankrupt could not pay up this order in full?

Mr. Horsley: I object to that.

The Court: I think he may answer. You mean by the bankrupt?

Mr. Giffin: Yes.

The Court: Did the bankrupt tell you why he couldn't pay it up?

A. He told me so many different things, Judge, it
137 would be hard to enumerate them.

The Court: I don't think we need to go into that.

Q. What was the total amount you received from December—from October 19, 1950, to October, 1951?

A. October 1, '51?

Q. From December 8, 1950, through October of 1951.

A. What date in October of '51?

Q. October 21.

A. Including that payment?

Q. Let's say until November 1, Mr. Dunham.

A. $75,923.72.

Examination resumed by Mr. Bonjean

Q. And, Mr. Dunham, did you—When these payments were made by Mr. Knetzer did you make any inquiry of him as to where he got that money?

A. No, I did not.

Q. Now, did you at any time learn where he got that money?

A. I did not.

Q. Mr. Dunham, did you testify at a grand jury hearing here in this U. S. Post Office during the year 1952?

138 A. I did on one occasion, if that was in 1952.

Q. Do you remember when that was?

A. I do not.

Q. Do you remember your testimony at that grand jury hearing?

A. Very well.

Q. Did that hearing concern money that Robert L. Knetzer had obtained from Robert Jaffke?

Mr. Horsley: I want to object to that.

The Court: What is the purpose of this? Impeachment or what?

Mr. Bonjean: To show he knew where this money came from that he had received during that period, that the trustee knew where the money came from he received during that period.

The Court: If he testified to that, you can ask about that.

Mr. Bonjean: I am asking about that.

Mr. Horsley: Object unless the question and answer is asked.

The Court: Objection sustained.

Mr. Horsley: No—Unless proper foundation is laid.

139 The Court: I don't want to rehearse right here all the grand jury hearing.

Q. Did you at that grand jury hearing testify this, or this in substance: That—

Mr. Horsley: Object to what he heard.

The Court: Let's hear what he testified.

Q. Did you testify at that grand jury hearing that during the year 1951 you received in excess of $5,000.00 from Robert L. Knetzer which he told you he obtained from Robert Jaffke?

A. I don't remember that.

Q. Well, did you?

A. I say I don't remember testifying that way.

Q. Would you say you did not testify that way?

A. No, sir.

Q. What?

A. No, sir.

Q. You don't remember, is that it?

A. I do not.

Q. Do you know that as a result of that grand jury hearing that an indictment was returned in this court, charging Robert L. Knetzer with obtaining $5,000.00 or more by false pretense from Robert Jaffke?

140 A. I do not recall that, no. I knew he was indicted on a number of counts. Whether that was one of them, I don't know.

Q. He was indicted as a result of your testimony?

Mr. Horsley: Object to that.

Mr. Bonjean: Strike that.

Q. Could you recall whether the—Do you remember the exact date that you testified before the grand jury at the time that you have related?

A. I do not. I think I was here two days.

Q. Do you recall whether that was in June of 1952?

A. I do not.

Q. Do you remember the year? You do remember that?

A. I am not so sure. I assume it was about '52.

Mr. Giffin: If the court please, in this bankruptcy proceeding we also contend that any money acquired by loans by the bankrupt during this period was after-acquired property, and any after-acquired property of the bankrupt, obtained subsequently to this adjudication, borrowed funds or not, this trustee doesn't have title to them,
141 and they should be returned to their rightful owner.

The Court: We are not facing that now, are we?

Mr. Giffin: That is the reason for showing this trustee

was on official notice by official proceedings when these payments were made in the turn over order. There was testimony before the court in creditors' meetings in this bankruptcy dating from April 13, 1950, through March 11, 1952, which are court transcripts in the bankruptcy court, that—where this trustee was present or his attorney where there was testimony regarding the borrowings and the schemes of this bankrupt.

Mr. Horsley: I move to strike that from the record in this case as being an attempt to impeach the order of this court of July, 1949.

Mr. Giffin: I am not attacking the turnover order.

Mr. Horsley: The testimony could only be for that purpose.

142 The Court: What is before us now? We are talking about this indictment, aren't we? What has that to do with what you are talking about?

Mr. Giffin: We are through with the indictment.

The Court: Go ahead with your examination, then. Let's get Mr. Dunham out of here.

Mr. Horsley: Has there been any indictment offered?

The Court: No.

Mr. Bonjean: Not yet.

Mr. Giffin: What I wanted to endeavor to go into was regarding these creditors' meetings at which the trustee or his attorney were present.

The Court: Somebody asked if he had any knowledge of borrowing money.

Mr. Giffin: What was the answer?

The Court: He answered no, he didn't: Let's go ahead.

Q. To refresh your recollection, Mr. Dunham, on April 13, didn't you hear testimony in this court regarding
143 money borrowed by Knetzer from Dr. Sanderson?

A. I probably heard testimony of some borrowing, but I didn't know it of my own knowledge.

Q. You know there was testimony given in this court under oath?

A. Perhaps so, yes.

Q. Do you know of testimony regarding borrowing from Mr. Dinorah?

Mr. Horsley: Object as not material, and move to strike the last two questions and answers.

The Court: If it would be testimony of anything, it would be very immaterial, I would say that. He said that he had heard such testimony, I think, if I am correct. Am I not?

The Witness: That's true.

The Court: And that you didn't know if it was true or not?

The Witness: That's correct.

Q. Did you hear a party named Dinorah testifying regarding a loan?

Mr. Horsley: I want to make the same objection.

144 The Court: I will let him answer.

A. I remember Mr. Dinorah ("Buster," I believe they called him) testified having loaned some sum of money to Mr. Knetzer at some time. The exact date I do not know.

Q. Do you recall it was in a creditors' meeting, the testimony given under oath?

A. I am quite sure it was.

Q. Do you recall the bankrupt himself regarding these borrowings?

A. I think he did.

Mr. Horsley: Object. This is after bankruptcy.

Mr. Horsley: Object to that. The evidence shows that he was indicted, tried and convicted of concealment.

Mr. Giffin: The evidence here doesn't show it.

The Court: He is asking of his own personal knowledge. I think he may answer.

A. May I hear the question, please? (Question read by reporter.)

A. No, no absolute knowledge.

Mr. Giffin: I think that's all.

Mr. Bonjean: I think that's all.

The Court: Do you care to cross examine?

Mr. Bonjean: That's all.

149 EDWARD B. DIERKES, called as a witness on behalf of the petitioner, and having been first duly sworn, testified as follows, in answer to direct Examination by Mr. Bonjean:

Q. State your name.

A. Edward B. Dierkes.

Q. Where do you live?

A. 3648 Meramec Street, St. Louis.

Q. What is your business, Mr. Dierkes?

A. I am retired.

Q. Retired. How old are you, sir?

A. Seventy-eight.

Q. I will ask you whether or not on or about December 13, 1950, you had any business dealings with Robert Jaffke.

A. Yes, sir.

Q. What was that business dealing that you had with him at that time?

Mr. Horsley: Object as being ex parte, pure hearsay.

The Court: Are you asking whether he made a loan?

150 Mr. Bonjean: I am getting to that. I didn't want to lead him.

Q. Did you make a loan at that time?

A. Yes.

Q. What was the amount of that loan?

A. Twelve thousand five hundred.

Q. On what date? Have you got a record of the date of that loan?

A. Yes, I have.

Mr. Horsley: May I have a running objection to this to save time?

A. December 13, '50.

Q. Did you receive any collateral for that loan?

A. Yes, sir.

Q. Has that loan been repaid to you?

A. Yes, sir.

Mr. Horsley: I object to that.

You say the loan has been repaid?

Mr. Bonjean: Yes.

Q. Did he do that over a period of time?

A. Yes, three years, about three years.

The Court: Any cross examination?

Mr. Horsley: No cross examination.

151 WILLIAM H. JAFFKE, called as a witness on behalf of the petitioner, and having been first duly sworn, testified as follows, in answer to Direct Examination by Mr. Bonjean:

Q. State your name.

A. William H. Jaffke.

Q. Where do you live, Mr. Jaffke?

A. 3931 Hollyhill Boulevard, St. Louis.

Q. What is your business or occupation?

A. I am in the banking business.

Q. What connection do you have at the present time?

A. I am a vice president of the Mercantile Trust Company, St. Louis.

Q. How long have you occupied that official position?

A. Nine years.

Q. Calling your attention to on or about the year 1950, the latter part of the year, did you have any business transaction with your brother, Robert Jaffke?

A. About that time he asked me to loan him some money, twenty-five hundred, which I did.

Q. Do you remember the date of that?

152 A. I am not sure of the date, but I know it was about that time.

Q. What do you mean when you say, "It was about that time"?

A. It might have been the 15th or 20th.

Mr. Horsley: Of what?

A. But I knew it was December, '50.

Mr. Horsley: May I have the same objection to all this testimony running?

Q. Has that loan been repaid to you?

A. Yes.

Q. Who repaid it to you?

A. My brother, Robert Jaffke.

Q. And did you have an other business dealing with him shortly after that loan was made to him by you?

A. About in October of '51, I loaned him $2800.00.

Q. That was in October of '51?

A. I believe that's right.

Q. Prior to that loan that you made to him on October 28 of 1951, did he consult you about any investment he was about to enter into?

A. He didn't consult me about an investment. He asked me if it was possible to obtain loans through—

153 Mr. Horsley: Object.

The Court: Objection sustained. He made the loan, no doubt about that. Objection sustained.

Q. You say he obtained $2800.00 from you when? October?

A. October of 1951.

Q. Of 1951?

A. That's right.

Q. Has that been repaid to you?

A. Yes.

Q. By whom?

A. Robert W. Jaffke.

Q. Do you know of your own knowledge what he did with that money?

A. No, I don't.

Q. Did you have any dealings with your brother, Robert Jaffke, that involved Robert L. Knetzer?

A. None that I knew of.

Q. Did you ever know Robert L. Knetzer?

A. Never met him.

Mr. Bonjean: I believe that's all

The Court. Cross examine.

154 *Cross-Examination by Mr. Horsley*

Q. You had no knowledge, then, of any Bison Development Company?

A. My brother never disclosed to me what he did with the money or what he wanted it for.

Mr. Horsley: That's all.

Q. (By Mr. Horsley.) You had loaned your brother many times, hadn't you?

A. Yes, we loaned each other money once in a while.

Q. And financed a lot of business deals for him?

A. I never financed any business deals for him. The money, if that is what you are referring to, was borrowed through another division of the bank. An officer of the bank doesn't pass on a loan made to his relatives, as you well know.

Q. That was a bank loan or personal loan?

A. Personal loan. Nothing to do with the bank.

Q. You didn't know what he was going to do?

A. I never asked and he never told me.

Mr. Horsley: That's all.

Mr. Bonjean: That's all.

155 HARVEY DAEUMER, called as a witness on behalf of the petitioner, and having been first duly sworn, testified as follows in answer to Direct Examination by Mr. Bonjean:

Q. State your name.

A. Harvey Daeumer.

Q. Where do you live?

A. 4016 Parker, St. Louis 16, Missouri.

Q. What is your business or occupation?

A. Buyer for Leacock Sporting Goods Company, 1011 Locust Street, St. Louis.

Q. Did you during the year 1950 have any business dealings with Robert Jaffke, the petitioner here?

A. No, sir, I did not.

Q. Did you ever loan Mr. Jaffke any money?

A. Yes, sir, I did.

Q. When was that?

Mr. Horsley: May I have the same objection?

The Court: Yes. Objection overruled.

Q. When was that?

A. September 17, 1951.

156 Q. 1951?

A. Yes, sir.

Q. How much did you loan him at that time?

A. $2300.00.

Q. Has that sum of money been repaid to you?

A. Yes, sir, it has.

Q. By whom?

A. Mr. Robert W. Jaffke.

Q. Over how long a period of time was that repaid?

A. Mr. Jaffke paid that back to me within four months. I received that payment December 31, 1951.

Q. Do you know of your own knowledge what that money was used for?

A. No, sir, I did not.

Q. Did you have any other business dealings with Mr. Jaffke?

A. Mr. Jaffke handles loans for my mother and my dad. Handled real estate transactions, I will say that.

Mr. Bonjean: That's all.

Mr. Horsley: No cross.

The Court: Have you any other short ones?

Mr. Bonjean: I think that's all.

The Court: I think we will recess until tomorrow
157 morning.

Mr. Bonjean: That's all.

(WHEREUPON the trial of the above entitled cause was adjourned at 4:30 o'clock p.m. on Thursday, October 14, 1954, to Friday, October 15, 1954, at 10 o'clock a.m.)

158 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

ROBERT W. JAFFKE,
Petitioner
-vs-
WILLIAM C. DUNHAM, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, bankrupt,
Respondent
} 11789

TRIAL RESUMED at 10 o'clock a.m., pursuant to adjournment

Springfield, Illinois, October 15, 1954

PRESENT: Same as before

Before the Honorable J. Leroy Adair, Judge presiding

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159 The Court: You may proceed with the case.

Mr. Bonjean: May we continue with this man from Chicago?

Mr. Horsley: One request. I have one witness from Cleveland, Ohio. Gerald Sammons. To testify that between October 1st and February, he paid to Knetzer the sum of $101,550. That was between October 1951 and February 1952. The only purpose of his testimony—I wonder if Counsel would stipulate. He has already testified under oath.

Mr. Giffin: That is testified to in this proceeding. I have the original and a certified copy filed in the bankruptcy file and a statement here that Knetzer states that he borrowed from Gerald Sammons $120,000.

Mr. Horsley: Maybe my figure was wrong.

Mr. Giffin: $103,550. That is right. Would you stipulate to what is said in this transcript?

Mr. Horsley: No, because I cannot put it in as an admission of the bankrupt. That is why I want to put it in as direct testimony.

The Court: He has testified to such?

Mr. Horsley: Yes, under oath. Sammons testified
160 in the criminal case. I have a transcript of that testimony. He was used for the Government and for the Defense. I think he testified three times.

Mr. Bonjean: Give us the benefit of examining the transcript and we can enter into a stipulation.

The Court: I think we may. Let's go ahead.

Mr. Bonjean: Mr. Robert W. Heinze.

ROBERT W. HEINZE, called as a witness, having been first duly sworn on oath, was examined and testified as follows:

Mr. Bonjean: State your name.

A. Robert W. Heinze.

Q. What is your address?

A. 134 N. LaSalle Street, Chicago.

Q. What is your business or occupation?

A. Attorney.

Q. How long have you been an attorney?

A. Approximately five years.

Q. Are you duly licensed to practice law in the State of Illinois?

A. Yes, sir.

Q. With whom are you associated?

161 A. Meyer H. Gladstone—H. J. Bush—

Q. Were you so associated on or about August 1, 1952?

A. Yes, sir.

Q. I will ask you whether or not, about August 1, 1952, or maybe shortly prior thereto, you had any professional dealings with Robert L. Knetzer?

A. Yes, sir.

Q. Did you meet Knetzer about that time?

A. Yes, sir.

Q. Tell the Court the circumstances of your meeting him.

A. In the Fall of—during the latter part of the summer of 1952, Mr. Bush, who was a senior office associate in the office, assigned me to a matter known in our office file as Robert L. Knetzer. I was sent to Milwaukee, Wisconsin, to interview Mr. Knetzer, for the purpose of investigating whether or not we would (our office) represent Mr. Knetzer. I spoke to Mr. Knetzer at the Marshal's office in Milwaukee and made arrangements to have him removed to Springfield, Illinois. Mr. Knetzer was given my office telephone number and my home telephone number. Shortly thereafter I received a number of telephone calls from Mr. Knetzer and some telephone calls from a Mrs. Knetzer, who asked me to come to Springfield.

Mr. Horsley: Object to any conversation.

The Court: Yes.

Mr. Bonjean: What did you do?

A. As a result of those conversations, I came to Springfield to meet Mrs. Knetzer and to interview Mr. Knetzer. Still to try to determine whether our office would represent Mr. Knetzer.

Q. Did you go to the Springfield City jail?

A. No, not at that particular time. I understood that a Mr. William Giffin had represented Mr. Knetzer, and as a matter of courtesy to him I went to his office to explain. I also met Mrs. Knetzer at that office. I was informed I would not be allowed to see Mr. Knetzer without the permission of the U.S. Marshal's office, and he informed me I would have to have an Order of Court. Those arrangements were made and I went over to the City jail and interviewed Mr. Knetzer. Just prior to entering the jail I met Mr. Robert Jaffke —

Q. Is he the gentleman sitting in the Court today?

162 Yes, sir. I met him in the first room as you enter the jail building, and Mr. Jaffke gave me a form of affidavit—

Q. I will ask you to examine Petitioner's Exhibit No. 24, is that the instrument he gave you?

A. Yes, sir. He handed me that unsigned form and told me—

Mr. Horsley: Object.

The Court: Yes, I cannot see where that would be—what did you do with the statement?

A. I took that statement to the cell part of the jail where I was going to interview Mr. Knetzer.

Q. Did you present this instrument to him?

A. Yes, sir.

Q. Did he say anything to you?

Mr. Horsley: Object.

Mr. Bonjean: It is very material if the Court please. In a proceeding of this nature I think it should be received subject to objection. Otherwise I would be forced to make an offer of proof.

The Court: What I am trying to do is to confine
163 this to a regular law suit and not strike out a lot of things. What was this question?

Mr. Horsley: It gets to the gist of the instrument.

The Court: What did he say to you?

Witness: I showed him the instrument and told him about a man who wanted him to sign it.

Q. Did he sign it?

A. Yes. First he asked me if he should sign it and I said "You cannot sign anything unless it is true."

The Court: So he signed it?

A. Yes, after I had—

Mr. Horsley: Object to the statement of counsel.

The Court: Yes, that is generally understood.

Mr. Horsley: Move to strike.

The Court: It may be stricken.

Witness: I had to go to the front of the jail and locate a Notary Public, and finally an officer of the Police Force notarized the statement for Mr. Knetzer.

Mr. Bonjean: Before Mr. Knetzer signed this in-
164 strument, did you obtain permission from officials of the Government regarding presenting this instrument to him?

A. Yes, I did.

Mr. Horsley: That would be pure hearsay.

The Court: I don't it could be important. He says it was signed.

Mr. Bonjean: Signed in your presence?

A. Yes, sir.

Q. Did he make any statement?

Mr. Horsley: Object.

The Court: Objection sustained.

Mr. Bonjean: Were you present when he was sworn to the truth of it by a Notary Public?

A. Yes, sir.

Q. Was Mr. Jaffke present at the place where he signed it?

A. No, sir.

Q. What did you do with the instrument after Mr. Knetzer signed it?

A. When I left the cell part and went to the front of the jail I returned the affidavit to Mr. Jaffke.

Q. Signed and notarized on the date that it bears?

165 A. Yes, sir.

Mr. Bonjean: That is all.

Cross Examination by Mr. Horsley

Q. Do you know who prepared this instrument?

A. No, I do not.

Mr. Horsley: That is all.

(Witness excused.)

Mr. Bonjean: Mr. Robert W. Jaffke may resume the stand.

ROBERT W. JAFFKE, a witness previously sworn, was recalled, and testified as follows:

Mr. Bonjean: You are the same Mr. Jaffke who testified, the petitioner who testified yesterday?

A. Yes, sir.

Q. I believe the last loan that you said you obtained in order to pay money to Mr. Knetzer was on January 8, 1951?

A. I believe that is correct.

Q. On that date—I believe you testified you gave him $1,000 that you obtained from Adolph Bohn?

166 Q. Did you repay that money to Mr. Bohn?

A. Yes, sir.

Q. Subsequent to that date?

A. Yes, sir.

Q. I hand you Petitioner's Exhibit No. 25. Tell the Court what that is.

A. A check dated April 1st, payable to myself for $1,000 showing for Adolph Bohn, of which I cashed and returned the money to the law firm of Tralles Hoffmeister and Gilpin to be returned to Mr. Bohn. He had me get the money in cash and asked that it be returned the same way.

Mr. Bonjean: I will ask that this be marked as Petitioner's Exhibit No. 26. (Exhibit marked.)

Q. I hand you Petitioner's Exhibit No. 26 and ask you to state what that is.

A. This is a receipt dated April 1, 1953, by the firm of Tralles Hoffmeister & Gilpin for $1,000 to be paid to Adolph H. Bohn. Receipt made to myself for $1,000. Dated April 1, 1953.

Q. After this loan that you obtained from Mr. Bohn on January 8th, you paid that money also to Mr. Knetzer?

A. Yes, sir.

Q. Did he give you a receipt for it?

167 A. No, sir. I didn't get a receipt until a later date.

Q. Is that amount reflected in receipts that you have?

A. Yes, sir.

Q. After January 8, 1951, did you have any further business dealings with Mr. Knetzer?

A. I gave Mr. Knetzer $520 on or about March 14, 1951. This money was to be used on the transaction previously discussed.

Q. What transaction?

A. On the development company. Housing project as an investment.

Q. Did he give you a receipt?

A. No, but he had promised me security of an automobile from a man he was clearing title on.

Mr. Horsley: Same objection.

The Court: Sustained.

Mr. Bonjean: Did you give him any more money?

A. $260 on May 21, 1951.

Q. Did he approach you for that or did you voluntarily give it to him?

A. He approached me.

168 Q. Where did you give that money to him?

Mr. Horsley: That is a conclusion, unless he is more specific.

Mr. Bonjean: Can you be more specific?

The Court: He has answered that.

Witness: Given to him downtown St. Louis, downstairs from John Schneider's office, 8th and Locust.

Mr. Bonjean: Was all of this money given to him in cash?

A. Yes, sir.

Q. At whose suggestion?

A. His.

Q. During the summer of 1951, did you give him any more money?

A. I did not see Mr. Knetzer until August, 1951; from May until August I was in Minnesota, and on my return I read of an accident in which he had been injured and was in the hospital. That is the only reason I knew where he was.

Q. During the times you have described, was he ever accompained by anyone?

A. No, sir.

169 Q. Was he ever accompanied by anyone when he approached you for the money on any occasion?

A. No, sir.

Q. Did each of the occasions when he approached you for money and you gave him money, occur in public places?

A. Yes, sir.

Q. When, after August 1951, if you did, did you give him any money?

A. During his confinement in the hospital, with broken leg, I advanced $300 to Mr. Knetzer for phone calls and such, as he put it to me.

Q. Where did you get that money?

A. My own money.

Mr. Bonjean: I am trying to show the Court, to verify to the Court.

The Court: He says it was his own money. Go ahead, if you want to.

Witness: That was in March from my own account.

Mr. Bonjean: For what purpose was that money delivered to him. The August and March money?

A. For the mining and development company.

Q. Did you give him any more money after that?

170 A. Yes, Mr. Knetzer received $2,000 from me in October 1951, and a few days later, in October, on the 22nd or so, he received $2800 from me.

Q. Making a total of how much at that time?

A. A grand total of $47,980.

Q. Where did you obtain that money?

A. $2,000 of that was obtained from Harvey Daeumer, 4016 Parker.

Q. Is he the man who testified yesterday?

A. Yes, sir. I borrowed $2300 from Mr. Daeumer, $2,000 I gave to Mr. Knetzer, the other $2800 was from my brother, Wm. H. Jaffke.

Q. The same Mr. Jaffke who testified?

A. Yes, sir.

Q. Did you give Mr. Knetzer any more money?

A. No, sir.

Q. What was the total amount of money you gave him?

A. $47,980.

Mr. Horsley: Further objection. Move to strike, as not the best evidence of any money paid to Mr. Knetzer.

The Court: You mean the testimony that he gave it in cash is not good evidence?

Mr. Horsley: If he has a receipt.

171 The Court: Go ahead.

Mr. Bonjean: Can you tell the Court whether or not you ever learned that this money that you paid to Mr. Knetzer, whether it was used for the development of the Bison corporation?

Mr. Horsley: Same objection.

The Court: Ask him whether he learned—whether or not.

Mr. Bonjean: Did you learn whether or not it was used or not used?

A. I learned that it was used.

Mr. Horsley: Object and move to strike.

The Court: It may stand.

Mr. Bonjean: When did you learn that?

A. Spring 1952.

Q. From whom?

A. Robert L. Knetzer.

Q. Shortly thereafter did you appear as a witness before a Grand Jury called in this U. S. Court House?

A. Yes, sir.

Q. Did you testify before that Grand Jury?

A. Yes, sir.

Q. Was an indictment returned against Robert L. Knetzer?

172 Mr. Horsley: Object.

The Court: He testified to all of this yesterday.

Mr. Bonjean: No, I think—

The Court: Ask him if he knows.

Mr. Bonjean: Was there an indictment returned?

A. Yes, sir.

Q. Of obtaining money from you by false pretense?

A. Yes, sir.

Mr. Horsley: Object and move to strike.

The Court: Yes. The fact that an indictment was returned. That is proper. Not to ask him what was in it.

Mr. Bonjean: Did any man, in the year 1951 or the year 1952, from the Federal Government contact you in the office in St. Louis?

Mr. Horsley: Object.

The Court: What is the importance of it?

Mr. Bonjean: We want to show where the Federal Government investigated where he obtained this money and to verify Mr. Jaffke's—

The Court: That would not help that I can see. Objection sustained.

Mr. Bonjean: Did Mr. Knetzer ever tell you how
173 much of this money you gave him was paid by him to the Trustee in Bankruptcy?

Mr. Horsley: Further objection for the reasons heretofore given.

The Court: I think I will let him answer. What is your objection?

Mr. Horsley: An admission by a bankqrupt against the title of the Trustee, the admission being made after title was passed. Cannot make admissions which are binding on the Trustee.

The Court: The question here is a question of whether money that was not the property of the bankrupt at the time of the bankruptcy passed to the Trustee. The question now is what?

Mr. Bonjean: If Mr. Knetzer told him how much of this money he had received from him was paid over to the Trustee in Bankruptcy.

The Court: No, that is not proper. Sustained.

Mr. Giffin: If the Court please, if that should be a declaration against interest by the bankrupt and admissible, we have case law to sustain that.

The Court: I don't think you have case law—I do not think it is proper. Objection sustained. Go ahead.

174 Mr. Bonjean: I hand you Petitioner's Exhibit No. 24, and ask you to state what that is.

A. Affidavit signed—dated August 1, 1952.

Q. Who prepared that affidavit?

A. I prepared it myself.

Q. Where did you get the information that you have in that affidavit?

Mr. Horsley: Object.

The Court: I think he may answer.

A. Secured from Robert L. Knetzer.

Mr. Horsley: Move to strike.

The Court: It may be stricken.

Mr. Bonjean: Where did you receive that affidavit?

A. In the outer lobby of the Springfield City jail on August 1, 1952.

Q. Who handed it to you?

A. An attorney named Robert Heinze.

Q. Is he the attorney who just preceded you in this case today?

A. Yes, sir.

Q. Do you have receipts for the money you gave to Mr. Knetzer?

A. Yes, sir.

175 Mr. Bonjean: I will ask that this be marked as Petitioner's Exhibit No. 27. (Exhibit marked.)

Q. I hand you herewith Petitioner's Exhibit No. 27, and state what that is.

A. Promissory note for $7,000 dated—

Mr. Horsley: I want to object to the testimony here.

The Court: Who is it signed by and what is it?

A. Promissory note signed by Robert L. Knetzer to Robert W. Jaffke.

Mr. Bonjean: When did you receive that?

A. March 1951.

Q. I hand you Exhibit No. 28 and state what that is?

A. Receipt dated December 22, 1950, signed by Robert L. Knetzer for $35,100.

Q. Did these receipts represent all the money you paid to Mr. Knetzer?

A. They do not.

Q. Do you have a receipt for any difference between that amount and the amount represented by these receipts?

A. No, I had title to his 1951 Cadillac.

Q. When did you obtain that?

176 A. October 1951 and a mortgage secured by the same car.

Mr. Horsley: Move to strike.

The Court: I think the testimony that he had a car from his proper.

Mr. Bonjean: Is that what you had security for $2800?

A. Yes, sir.

Mr. Horsley: Object.

The Court: It may stand.

Witness: $2800 was paid by a relative of Mrs. Knetzer.

Q. Did you surrender the mortgage upon payment of the $2800?

A. Yes, sir.

Q. Can you explain to the Court the dates that appear on these receipts?

Mr. Horsley: I think the receipts will show for themselves.

The Court: It is the date they were given to you?

A. The date on the note is not the date it was given. Mr. Knetzer was confined to jail a few days after he secured $7,000 from me; in January before he could give me a receipt—in 1951—and upon his release in March 1951 he said "I never did give you a receipt" and all I
177 had in my bag was a note and I drew it up and he signed it. The receipt and the note, together, combined all the money he owed me up to that time.

Q. What about the date on this instrument?

A. Dated December 22, 1950, is the combined money from December 7 through December 22, that he received from me.

Q. Did you ever receive back from Mr. Knetzer, or from anyone in his behalf, any part of this $47,000?

A. The $2800 was paid to my brother.

Q. Any other money?

A. No, sir.

Q. Where did he obtain the money to pay these loans that you explained to the Court—

Mr. Horsley: Object.

The Court: I do not know where he got it—I don't care.

Mr. Bonjean: That is all.

Cross-Examination by Mr. Horsley

Q. Mr. Jaffke, how old are you?

A. Forty-one.

178 Q. You have been in the real estate and investment business for how long?

A. For myself, since 1939.

Q. Daily and weekly you handled loans?

A. Yes, sir.

Q. Loans with corporations and other institutions?

A. My business is strictly with private individuals.

Q. You obtain loans from corporations?

A. I borrow at Mercantile Bank.

Q. You build houses?

A. Yes, sir.

Q. Financed through R.F.C. or F.H.A.?

A. No, sir.

Q. Through the bank?

A. Through private money.

Q. Did the firms mentioned ever handle these transactions?

A. I have not had occasion for law work other than wills.

Q. On the title work and other investment work this law firm handled it?

A. Yes, in the last six or seven years.

Q. During the time you say you were giving this
179 money to Knetzer, did you see the charter of this corporation?

A. He showed me an impressive looking document, which I presumed was the charter.

Q. Did you ever see the books and records of the corporation?

A. No, sir.

Q. You knew who the incorporators were?

A. No, sir.

Q. You knew one was Ed Kane from Edwardsville?

A. Yes, sir.

Q. The architect?

A. Yes, sir.

Q. Did you ever talk to Ed Kane before you invested?

A. No, sir.

Q. You knew he was an officer of the corporation?

A. He was supposed to be a member.

Q. You knew Knetzer was not a member?

A. Yes, sir.

Q. Tell you why?

A. He told me he was not a member because of his bankrupt condition.

180 Q. You mean he did not want anyone to know he was connected?

A. No, he did not explain. Other than that anything his name was connected, that would stand too much investigation about concealing assets, said he had known—

Mr. Horsley: I disclaim the statement "he had known."

The Court: I think that part may be stricken. Self-serving statement.

Mr. Horsley: When was this conversation?

A. On the evening of December 6, 1950.

Q. That was before you had given him any money?

A. Yes, sir.

Q. Did you intend to purchase any stock in the corporation?

A. No, sir.

Q. Will you explain how you were dealing with a corporation when you were not buying stock in the corporation?

A. I was not familiar with the corporation work. He gave me a glowing picture of a good project and I was just finishing one that paid 50 per cent profit.

181 Q. You mean in the same manner, it paid you fifty per cent profit.

A. I advanced money in a similar way—he was building—

Q. Is that one of these F.H.A. deals?

A. That was F.H.A.

Q. And you made a fifty per cent profit on your investment on that deal?

A. Yes, sir.

Q. When was that?

A. March 1, 1950.

Q. What project was that?

A. A personal project with another builder named Chapman and myself.

Q. What was the name of the project?

A. 4617 through 31. Santa Monica, California.

Q. Was there a title, a name on the project?

A. No, sir. This man wrote me a letter.

Q. What was the name of the man?

A. A. F. Chapman.

Q. You knew several months before you saw Knetzer, that he was under an Order to turn over to the Court $250,000?

182 A. Only knew the information I received from you.

Q. We told you he was under order to turn over to the Court $250,000?

A. That had been some time previous.

Q. That was in January 1950?

A. Yes, that would have been the date.

Q. I hand you Defendant's Exhibit No. 1, and ask you if that is a true and correct copy of the information mailed to you as the progress made in this bankruptcy?

A. That is the one.

Mr. Horsley: We offer Defendant's Exhibit No. 1.

The Court: Any objection? (No objection.)

The Court: It may be received.

(Defendant's Exhibit No. 1 received in evidence.)

Mr. Horsley: This money that you say you gave Mr. Knetzer, was a personal loan to him?

A. No, this was money for this building project.

Q. You did not loan it to the corporation?

A. No, but there was chattel mortgage.

Q. You were not to get any stock?

A. No, sir.

183 Q. You entered into this so as to get interest on your money, or profit?

A. Profit.

Q. You did not know how much profit you would make?

A. No, because it was not determined and my profit was a percentage, in accordance with what the other individuals had put up.

Q. What had they put up?

A. I don't know.

Q. You knew Ralph Riley had put up money?

A. At that time he said Mr. Riley had invested.

Q. You discussed with Mr. Riley in March 1951 the difficulty he had with Mr. Knetzer?

A. I believe I met Mr. Riley in March.

Q. And he told you he was having trouble getting his money from Knetzer?

A. I don't remember the substance of the talk but Mr. Riley was very much disgusted.

Q. And he had given up on the whole deal and was having trouble getting title for the Cadillac, and he could not get the money?

184 A. He got the money.

Q. You loaned it?

A. No, sir.

Q. So you knew the trouble Mr. Riley was having in March 1951?

A. Yes, sir.

Q. And notwithstanding, you say after that date you gave Mr. Knetzer some $5500?

A. Yes, sir.

Q. Now the first $6100 you gave Mr. Knetzer on the 7th or 8th of December 1950 was given to him for the specific purpose of paying it to Mr. Dunham on the turn over order so he could stay out of jail?

A. Yes, $3800 was.

Q. I took your deposition, Mr. Jaffke, on March 26, 1953, in my office, didn't I?

A. Yes, sir. You took my deposition.

Q. You say part of that $6100 was to be used on the deal?

A. That is correct.

Q. And part of it for the turn over order?

A. $3800 for the turn over order.

Q. Did I ask you this question: "In other words,
185 you just gave him the money to use as he saw fit?" And you answered: "On this particular $6100; everything he got from me was entirely for the deal except on this initial $6100. He said he was being pressed by the Court and had to make payment in order to remain out or he would be back in jail pending payment and he took the original $6100, part of it he could get by with and was supposed to have paid it to the Court."

Mr. Bonjean: If the Court please, that is not impeachment.

Mr. Horsley: The other money was to be used as he saw fit?

A. Legal expenses.

Q. Will you tell me, Mr. Jaffke, if you say part of that was for the deal, why was that $6100 to be paid to you by another individual?

A. It was not—

Q. I will ask you if I did not ask you: "How was that $6100 to be repaid to you" and you answered: "He was to get it back to me when he got it from another individual later."

My question is, did you make that answer on that date?

186 A. Yes, sir.

Q. Then I asked you "Who was the other individual" and you answered "I don't know?"

A. Yes, sir.

Q. Any office dealings that you had had in 1947 and 1948, you dont mean to give the Court the impression that all of these tractors you bought, you have a farm you have an interest in?

A. I do not.

Q. You expected to make a profit?

A. Yes, sir.

Q. So you were in on the tractor deal with several other investors who had put money in?

A. It was a deal that I, myself, got into.

Q. You knew what those tractors were selling for on the open market?

A. No. I owned this farm in S. Dakota, I spent months there each year. Paying huge prices for used equipment, so I saw the tractors and I put a deposit on three, one for myself and two for neighbors.

Q. And you went back later and put up $7,000—

A. No, that is not correct.

187 Q. What is correct?

A. Mr. Knetzer approached me in St. Louis and sold me on the idea of depositing $7,000 on seven more.

Q. Your purpose was for profit on the seven tractors —they would sell for more than list price, and he was agreeing to sell them to you for list price?

A. Yes, sir.

Q. So you had knowledge when he went bankrupt, that he had been engaged in fraud schemes.

A. I knew the man was bankrupt. I did not have any knowledge of fraud except what was in the papers.

Q. You knew the paper reported that he was buying the cars from Wolfe and paying $1,000 more for each car—

A. I read what everybody else did. Each report was different.

Q. That was in 1948?

A. Yes, sir.

Q. After that time did you know how much money he had paid on the turn over order, when you talked
188 to him in October 1950?

A. No, sir.

Q. Did you ask him?

A. No, sir.

Q. But the first $6100 was for the turn over order?

A. $3800—

The Court: Here is a transcript in which he says he had borrowed some $40,000 during that period. The Trustee has no opportunity to cross-examine him. I seriously question that it is good, but I will admit it and I will strike whatever you think we ought to after the briefs are in. Is there any objection to Defendant's Exhibit No. 1?

Mr. Horsley: I have not finished. Objection to 29, pure hearsay and the declarations of the bankrupt are not admissible after title has passed to the Trustee and otherwise incompetent, irrelevant and immaterial.

The Court: Over-ruled.

212 Mr. Horsley: Same to 24 and 29.

The Court: Exhibit No. 1 of the defendant is admitted.

Mr. Horsley: I want to stipulate that a man by the name of Gerald Sammons paid to Robert L. Knetzer the sum of $101,550 between October 1, 1951 and some time during the month of February, 1952.

Mr. Giffin: We will not stipulate.

Mr. Horsley: Make it November 1st.

Mr. Bonjean: We will so stipulate.

The Court: I am going to admit it.

Mr. Horsley: If he were present he would testify under oath.

The Court: How do you gentlemen want to handle this?

Mr. Horsley: I have a couple of witnesses.

The Court: Proceed.

Mr. Horsley: Mr. Clinton Petty.

CLINTON PETTY, called as a witness, having been first duly sworn on oath, was examined, and testified as follows:

Mr. Horsley: Your name is Clinton Petty?

A. Yes, sir.

Q. After that date you gave him another sum of money in December. Tell me exactly, if you know, who was to repay you that money?

A. That was not to be repaid at all unless I requested it. That is why he drew the receipts up. I said "I am drawing up the receipts" and he said he would get the money from another individual.

Q. You testified in the trial in which Mr. Knetzer was convicted for concealing assets?

A. Yes, sir.

Q. You testified as a witness?

A. Yes, sir.

Q. And you were subpoenaed?

A. Yes, sir.

Q. You did not file any subpoena with the court or claim a witness fee?

A. No, not from the court; I claimed it from
189 Knetzer.

Q. Did he pay you?

A. No, sir.

Q. You had no witness fee or mileage advancement?

A. No, sir.

Q. At the time Knetzer went bankrupt he owed you $11,300?

A. Yes, sir.

Q. You hired attorneys and tried to collect?

A. I hired an attorney to file a claim.

Q. You also went over to see Knetzer?

A. I went through Edwardsville to Virden to relatives, and I saw Knetzer, a chance meeting.

Q. Did you on or about April 1, 1951, either loan
213 or deposit or by some method give to Robert L. Knetzer, $5,000?

Mr. Bonjean: Objected to as leading.

Mr. Horsley: I am sorry. Did you during the months of April and May 1951 give certain sums of money to Robert L. Knetzer?

A. Yes, sir.

Q. Give the date and amount?

A. I can come pretty close to it. I was confused as to the exact date. My memory, April 1st, the bank records show April 15, 1951, $5,000. Next date, April 29, $7500, May 4, $8500, May 10, $8000, May 28, $14,500.

Q. Any money after that?

A. I believe $500. I cannot give the date.

Q. Approximately?

A. I would say the latter part of July or the first part of August.

Q. You don't know what happened to that money of your own knowledge?

A. No, sir.

Q. On the 28th of May 1951 when you gave $14,500
214 to Knetzer, was anyone present?

A. Yes, sir.

Q. Who?

A. Robert Jaffke.

Q. Where?

A. Statler Hotel, St. Louis, Mo.

Mr. Horsley: That is all.

Mr. Bonjean: No cross-examination.

Q. Up to the time you gave him this additional money in December 1950, none of that $11,000 had been repaid to you?

A. No, sir.

Q. I will ask you if when you testified on that trial on the 12th of February 1953, the attorney, Manuel Wiseman, attorney for Robert Knetzer, didn't ask you: "Since October 5, 1948, have you loaned any money to Robert Knetzer?" and you answered: "Yes, Mr. Knetzer received the sum of $47,980 from me."

190 A. Yes, sir.

Q. You did make that answer?

A. Yes, sir.

Q. When you were dealing with him along in December you took it for granted that he was not a member of this corporation or had any stock in it because of his trouble with the Court?

A. He said he was General Manager and named the other members of the corporation.

Q. But he did not have his name in the records because of his trouble with the Court?

A. That is right.

Q. You did not give him any money after—so we can summarize this for the Court, you claim that on December 7, 1950 you gave him $6100?

A. Yes, sir.

Q. On December 13, 1950, $12,500?

A. Yes, sir.

Q. December 18, 1950, $7500?

A. Yes, sir.

Q. December 21, 1950, $9,000?

A. Yes, sir.

Q. On January 3, 1951, $6,000?

A. Yes, sir.

Q. On January 8, 1951, $1,000?

191 A. Yes, sir.

Q. And you gave him no money between January 8 and April when you gave him $540?

A. March, I believe.

Q. Was that when he had just got out of jail?

A. A day or two after that.

Q. And he needed some money to get around on?

A. To get the corporation working.

Q. I believe you said it was for phone calls?

A. No, that was while he was in the hospital.

Q. You heard him make those phone calls?

A. I heard him make calls.

Q. Was he traveling around?

A. I don't know. I did not go with him.

Q. You don't know what he did?

A. No, sir.

Q. Do you know Clint Petty?

A. I met him.

Q. You met him in April or March?

A. I met Mr. Petty one day in the Spring.

Q. If he says that date was May 28, 1951, would that be correct?

A. I would take his word for it.

192 Q. You were not giving Knetzer any money from April 1 through May 28, other than the $540?

A. I had given him $260 on the 21st.

Q. Wasn't that in August?

A. May 21, 1951.

Q. Was that what you testified on your deposition you gave him $260 during the summer?

A. During the summer—could have been the $300 when he was in the hospital.

Q. Did I ask you "Did you give him any money after that" and you answered "I gave him $260 during the summer?"

A. That would be it.

Q. Did you see Clint Petty open a sack and give Knetzer $14,500 on May 28th?

A. Knetzer received money from Mr. Petty but I don't know the amount.

Q. On that day Clint Petty did open a sack in your presence that had money in it and handed to Mr. Knetzer?

A. He had a sack and they put it on the bed or something and the three of us were going out. I was invited up by Mr. Knetzer and Mr. Petty came in and was surprized to see another man, and he introduced us and said
193 "This fellow is all right, in this thing with us" and Mr. Petty, I think, passed the sack or put it on the bed, and as we were going out, in a matter of minutes, Mr. Petty reminded Mr. Knetzer about the parcel and he went back and received it and we left the hotel and that is the last I saw Mr. Petty until—

Q. If during the period from December 7, 1950 through January 8, 1951, Robert Knetzer only paid Mr. William Dunham the sum of $10,000, you don't know what he did with the rest of the money?

A. I know he told me later on.

Q. During that period Mr. Knetzer was working on the corporation deal?

A. Yes, sir.

Q. How much money he spent on the deal you don't know? And as far as you know, when he died he may have had some in the corporation?

A. I don't know.

Q. As far as your personal knowledge, you don't know, other than this first $6100, how much of your money was turned over to William Dunham by Mr. Knetzer or anyone for him?

194 A. Other than information received from Knetzer.

Q. Other than that you have no personal knowledge?

A. No, sir.

Q. Along in January 1951 you gave Knetzer $1,000 the day before he went to jail?

A. I gave him the $1,000 and did not know he was going to jail.

Q. He went that afternoon?

A. I don't know—I heard he was in jail.

Q. And this $300 you gave him in the hospital was for expenses—

A. To keep in contact with the Bison development transaction.

Q. About that time you were snooping around to see what he had done with your money?

A. Yes, sir.

Q. That was in the summer of 1951?

A. Yes, sir.

Q. And the F.B.I., you say you had some conversation, you had been in contact with the F.B.I.?

A. The F.B.I. contacted me, I don't know the date.

195 Q. You were snooping around on Knetzer at that time?

A. No, not until after his stay in the hospital.

Q. That was before you gave him $4800 more?

A. Yes, for which he gave me security.

Q. And you collected that?

A. No, collected on it.

Q. What was the security for the other $2000?

A. He gave me a signed title and mortgage signed by his wife for the $2800 and my brother received $2800 back from a relative of Mrs. Knetzer after Mr. Knetzer was confined in jail and she was pregnant and I released the car back to her on the payment of the $2800 so she could have some money for the birth of the baby.

Q. You had secured the money and gave it up?

A. Yes, sir.

Q. That $4800 was not given on a deal to do with this investment? Why did you require him to give you security?

A. I had realized this man could not be trusted.

196 Q. If you knew him—you did not give him $4800—you loaned it to him and took title to his car?

A. He said it was to be used on the project—he says "You fellows are kicking me when I am down."

Q. You testified this morning some of this money was to be used by the corporation to show on their books as assets to make their loan application look better?

A. Yes, sir.

Q. How was that to get into the corporation without knowing Knetzer's name?

A. I don't know.

Q. That shows he was a con man?

Mr. Bonjean: Object.

The Court: It may stand.

Mr. Horsley: You knew he never delivered any tractors except three?

A. I don't know. All I know is I didn't get mine.

Q You saw the account in the paper that the only tractors were three he got from Ralph Riley?

A. I don't know.

197 Q. You never saw any balance sheet or any statements of this corporation?

A. No, sir.

Q. Even though a part of your money was supposed to go into the assets of the corporation?

A. Yes, sir.

Q. But you still looked to Knetzer to pay that money to you and not to the corporation?

A. Yes, sir.

Q. Your attorney here has had some notes, which he has had identified and you have testified about. If you were to share in the profits of this transaction, why do these notes bear the dates on which you were to be repaid?

A. For the reason that Knetzer knew I was borrowing from individuals and I could not get into anything that would break out.

Q. He knew you was borrowing the money?

A. Yes, sir.

Q. Did he talk to these people?

A. No, sir.

Q. Did you tell them what you were doing with the money?

A. No, sir.

198 Q. After this R.F.C. thing fell apart, then this $4800 on which you took title to his car, was that to go in the same development?

A. Other than he was going to develop a Christmas tree project. He had Mr. Kane drawing plans for a huge mail order of some kind.

Q. Did you see those plans?

A. I saw Mr. Knetzer at the Statler Hotel with the plans.

Q. When was that?

A. Shortly after Knetzer was released from the hospital in 1951.

Q. And you knew Knetzer was an officer of the corporation?

A. Yes, sir.

Q. Did you talk to him?

A. No, sir.

Q. At that time, you testified you were snooping around.

A. I don't think it was at that time.

Q. Right after he got out of the hospital you were snooping around?

A. Yes, sir.

Q. And yet you didn't ask Mr. Kane about it?

A. I didn't even ask Mr. Knetzer.

Q. I thought you said you saw the blue prints?

199 A. He had the plans but I didn't meet him.

Q. How did you know he was there?

A. Knetzer told me.

Q. You didn't ask him?

A. He was there with his boy; he said "This is a big deal, this is not dead."

Mr. Horsley: I disclaim the answer.

The Court: It may be stricken.

Mr. Horsley: You never asked him about the turn over order for this $6100?

A. No, sir.

Q. Never had any conversation with him until this affidavit in 1952?

A. Not until after he was confined in jail in 1952, in February.

Q. Did you know Gerald Sammons?

A. Not other than seeing him at the Grand Jury investigation.

Q. You heard him testify that he loaned Knetzer $101,550 between October 1951 and February 1952?

A. I don't know if I heard the testimony. It was restricted from the witnesses.

Q. Did you know the total amount Clint Petty put in, in April and May 1951?

200 A. I don't know anything about his dealings with Mr. Knetzer. I saw him one time in the Spring.

Q. You knew that the Marshal—he was supposed to be in the custody of the Marshal when he was out?

A. —

Q. I asked you about that in December. You know about Grant?

A. I do now. I didn't know.

Q. You knew the Marshal was in another room at that time?

A. I asked him and he said that was paper talk "I am not in custody of anyone."

Q. He reported to him in St. Louis?

A. I don't know. I never saw Mr. Grant.

Q. As far as you know you don't know what was done with the money you gave to Mr. Knetzer?

A. No, sir.

Q. And you don't know whether there are some oil or timber properties, of your own personal knowledge?

A. That is right.

Q. This $1,000 that you gave him on January 8, 1951, he told you he needed that for attorneys' fees?

A. Yes and expenses on his development.

Q. You had an attorney who handled your affairs?

A. Any time I had something.

Q. Who was the attorney who was going to handle this for Knetzer?

A. He named several. One was Larry Woods of Montana, he named Mr. Wiseman of Alton.

Q. You knew Wiseman was his attorney along with Phil Listman? You wrote a letter to Wiseman when you wanted to get your $11,300?

A. Yes, sir.

Q. You knew Wiseman was the attorney?

A. That was two years—two months previous.

Q. You brought Mrs. Knetzer up here every few days to see Mr. Knetzer in jail?

A. Yes, sir.

Q. Did you drive Knetzer back and forth every day during the trial?

A. Yes. I was under subpoena.

Q. You brought Knetzer back and forth?

A. Yes, sir.

Q. Every day of a trial that lasted about three weeks?

A. That was the snooping.

202 Q. You just brought him back to snoop?

A. With the sanction of the F.B.I.—that dates back to the Fall of 1951.

Q. Summer of 1951, before you loaned him $4800 more?

A. For which I got security.

Q. You don't claim that $4800 in this transaction?

A. No, sir.

Q. You don't claim the other $2,000?

A. Yes, sir.

Q. You gave up security that you had in your possession?

A. I did not give it up. He talked me out of it.

Q. I am talking about January 1953 when you drove Knetzer up here every day? That is true?

A. Yes, sir.

Q. Were you paid any expenses by him?

A. Still owes me for that. My subpoena fee, witness fee, but he mostly bought the gas.

Q. But you never filed a claim for your witness fee?

A. That would have to come from Knetzer.

Mr. Horsley: That is all.

203 *Re-Direct Examination by Mr. Bonjean*

Q. Mr. Jaffke, you were asked by Mr. Horsley on cross examination if you had made this statement on a deposition hearing on March 26, 1953: Q. "How was this $6100 to be repaid to you" and you gave this answer: "He was to get it back to me when he got it from another individual later." Did Mr. Horsley ask you this question: "Did he assure you he had plenty of assets he could make this good as soon as he could get cleared up with the Court?"

Mr. Horsley: Object.

The Court: Let him answer.

Mr. Bonjean: Did you make this answer? "He did not assure me had any assets except he had several deals pending, and there would be considerable money involved and that this building project would involve an R.F.C. loan and out of the construction of houses that would go fast, he would have money coming in."

Mr. Horsley: Object. Does not explain anything.

The Court: I think we have already had that in the record. I don't think it makes any difference. Let him answer.

204 Mr. Bonjean: Did you make that answer?

A. Yes, sir.

Q. On this trial of Mr. Knetzer for concealment of assets, you stated on cross-examination that you were subpoenaed as a witness?

A. Yes, sir.

Q. During your testimony, Mr. Horsley asked you if Mr. Wiseman asked you this question: "Since October 5, 1948, have you loaned any money to Robert L. Knetzer?" and you answered: "Yes, Mr. Knetzer received the sum of $47,980 from me."

A. That is correct.

Q. Were you asked any further questions at that time as to for what purpose you gave him that money?

A. I would not remember that. I doubt it.

Mr. Bonjean: That is all.

(Witness excused.)

Mr. Horsley: I again renew my motion to strike all of the testimony of this witness and to strike those portions to which objections have been made throughout.

205 The Court: Motion denied, but the Court will take the objections and motions on the specific grounds as designated by Counsel.

(Witness excused.)

Mr. Bonjean: Mr. Cohn.

SAUL E. COHN, called as a witness, having been first duly sworn on oath, was examined, and testified as follows:

Mr. Bonjean: State your name.

A. Saule E. Cohn.

Q. Where do you reside?

A. 700 N. 39th, E. St. Louis.

Q. What is your business?

A. Lawyer.

Q. Duly licensed to practice in the State of Illinois?

A. Yes, sir.

Q. How long?

A. Twenty-one years.

Q. Your office is where?

A. 430 Mercantile Bldg., E. St. Louis.

Q. Calling your attention to the period from December 7, 1950 to November 1, 1951, did you make any payments to Mr. William Dunham, Trustee in Bankruptcy?

206 A. Yes, sir. I assume that is the period.

Q. I believe Mr. Dunham has testified that from April 14, 1951 to November 1951 you paid approximately $70,000 to the Trustee.

A. I paid the Trustee some money. It might have been —if you say that is the amount.

Q. Can you tell the Court from whom you received that money?

A. Some times Robert Knetzer—and other people.

Q. How much did you receive from Robert Knetzer?

A. A large portion of it.

Q. In excess of $30,000?

A. All I can say is that more of it was paid by him than any other one. I don't have my records with me. Mr. Giffin called me this morning and I told him I would be delayed if I went to my office.

Q. Do you know where Mr. Knetzer obtained the money?

A. No, sir.

Q. On any of these occasions when you received money from Mr. Knetzer, did you ever see Mr. Robert Jaffke
207 with him?

A. One time.

Q. Can you tell the circumstances?

A. I may be confused. I saw them at Springfield at a hearing and I have a recollection I saw him one time in the office. I have never known his name until today, but I think on one occasion the girl called me that Mr. Knetzer was in the office, and Mr. Jaffke was there.

Q. Was he present at any time when Mr. Knetzer turned money over to you?

A. No, sir.

Q. Did Mr. Knetzer turn money over to you on that date?

A. No, sir.

Mr. Bonjean: That is all.

I would like to offer Exhibits 1 through 28. We have some other exhibits to present. I will ask that this be marked Exhibit No. 29. (Exhibit marked.) Stipulate that these are records in the proceedings of the bankruptcy case. No. 29 is a record, and No. 30 is a certified copy by the Clerk of the Court of the indictment of Knetzer of defrauding Robert Jaffke of money. Nos. 1 through 23 exhibits showing loans obtained by Mr. Jaffke in order to

pay this money. Receipts and checks that he paid
208 out to Mr. Knetzer.

Mr. Horsley: Defendant objects to Exhibits 5, 9, 10, 11, 12, 13, 14, 14-A, 15 and 15-A, 16 and 16-A, 17, 18, 19, 20, 21, 22 and 23, for the reason that the foundation upon which said exhibits are based are given by the witness, who is incompetent under the Evidence Act of the State of Illinois and under the Rules of Evidence and Statutes governing the receipt of evidence by this Court, and said exhibits are incompetent and irrelevant.

The Court: Objection over-ruled. Exhibits admitted subject to briefs to be submitted by Counsel on both sides.

Mr. Horsley: On the other exhibits, I want to offer the same objection that they are self-serving documents on the part of the plaintiff. As to 6, 7 and 8, these are based upon testimony of a witness who is not competent to testify for the reasons heretofore given.

The Court: Objection will still be over-ruled, with the same statement that I have heretofore made regarding the former objection.

Mr. Horsley: Exhibit No. 24 is objected to for the
209 reason that it consists of hearsay testimony, consists of a declaration of a bankrupt which is contrary to the title of the Trustee, with such admission being made after bankruptcy and also after title to the specific moneys involved has passed to the Trustee and that same cannot be binding upon the Trustee, that same is not in the same category as the declaration against interest on the part of the bankrupt and that same is contrary to the testimony given by the plaintiff, and that the foundation for such exhibit is based upon incompetent testimony of Robert Jaffke, who is not a competent witness to testify for the reasons heretofore given, and that it is an ex parti affidavit without any right of cross-examination on the part of the defendant.

Otherwise irrelevant, incompetent and immaterial.

The Court: I am going to allow it at this time and you may discuss it in your briefs.

(Exhibits 1 through 30 admitted subject to briefs being submitted.)

Mr. Horsley: Exhibits 25 and 26 objected to on the same grounds as Exhibits 5 and on.

The Court: Objection over-ruled.

210 Mr. Horsley: Exhibits 27 and 28 objected to on the same grounds as Exhibit 24, as heretofore stated. I want to make the further objection that it is contrary to the evidence of the petitioner here and I believe is an effort to impeach his own testimony, irrelevant, incompetent and immaterial.

The Court: Admitted at this time.

Mr. Horsley: Object to 30, being the indictment of Robert L. Knetzer for supposedly defrauding Robert Jaffke. The man was never tried upon the case and the indictment is never considered as competent evidence.

The Court: I will admit it nevertheless.

Mr. Horsley: Pure hearsay evidence and incompetent, irrelevant. Exhibit 29 is a transcript of proceedings had on March 11, 1952 before Hon. Charles G. Briggle, in the presence of Mr. William Giffin, who was then attorney for Robert L. Knetzer. This is a transcript of hearing had on the petition of the bankrupt to be released from jail in the custody of his attorneys to get out and get the money and bring it in.

Mr. Giffin: In this statement, the bankrupt was put under oath and sworn in the presence of the Trustee's
211 attorney and the Court—he stated when Mr. Doyle interrogated him, what the record shows, that he had borrowed from different people—Mr. Knetzer testified he borrowed more than $40,000 from Mr. Jaffke. Testified in open Court.

The Court: I think it will be admitted, and I will listen to any objection.

Mr. Horsley: Transcripts of a hearing are not admissible against the title of a trustee.

Cross-Examination by Mr. Giffin

Q. What is your profession?

A. At the present time commercial fisherman.

Q. What were you at the time you loaned the money to Mr. Knetzer?

A. We operated a cigar store. Booked horses.

Mr. Giffin: That is all.

(Witness excused.)

Mr. Horsley: Ralph Riley.

RALPH RILEY, called as a witness, having been first duly sworn on oath, was examined, and testified as follows:

215 Mr. Horsley: State your name and address.

A. Ralph Riley, 226 W. Spring, Booneville, Missouri.

Q. Were you acquainted with Robert Knetzer?

A. Yes, sir.

Q. Did you give to him any money in the year 1950?

A. Yes, sir.

Q. Can you give us the dates and amounts, approximately?

A. Total amount $32,000, June 28, $250, June 29, $1,000, July 12 or 15, $6,000, latter part of July or first part of August $9,000.

Mr. Horsley: I have these dates if Counsel does not object.

The Court: That is all right. State what you have testified to and you go ahead and testify from the records.

A. June 28, 1950, $250, June 30, $1,000, July 2, $600, July 18, $6000, July 27, $9,000, August 2, $200, August 10, $8,000, August 22, $2208, August 27, $2831, Sept. 12, $2300.

Mr. Horsley: Is that the last money you gave to him?

A. Yes, sir.

216 Q. Do you have any personal knowledge as to what he did with the money?

A. No, sir.

Q. Did you have a conversation with Mr. Jaffke in March or April 1951?

A. Yes, sir.

Q. Did you at that time advise him as to your dealings with Knetzer in this matter?

A. We talking about our dealings.

Q. Had you been trying to get your money back from Mr. Knetzer?

A. Yes, sir.

Q. Did you so advise Mr. Jaffke?

A. I advised him I was in town to collect for a Cadillac that belonged to me and I did collect.

Mr. Horsley: That is all.

Cross-Examination by Mr. Giffin

Q. When was the last date Mr. Knetzer obtained any money from you?

A. Sept. 12, 1950.

Q. What did he obtain that money for?

Mr. Horsley: Object.

Mr. Bonjean: It is important.

217 The Court: I think he may answer.

A. It was to be used for the development of lumber and oil leases in Canada and Wyoming and Montana.

Q. Directing your attention to December 1950, you had never met Robert Jaffke at that time?

A. No, sir.

Q. Did you see him?

A. Yes, sir.

Q. At that time you had not made any investigation or had found that any of your so-called properties in the company were non-existent at that time?

A. No, sir.

Q. At that time you still—your connection was in this development of these activities?

A. Yes, sir.

Q. About when was it you first became skeptical?

A. About the middle of January 1951.

Q. You did not so advise Mr. Jaffke immediately?

A. I have no recollection of seeing Mr. Jaffke until March. I had met him in December, but I have no
218 recollection—

Q. Did you afterwards learn that Mr. Knetzer was saying that Mr. Jaffke was doing this and you were doing that and you had a misunderstanding as to what—

Mr. Horsley: Object to the question.

Mr. Giffin: Strike the question. You did, at a later date, talk to Mr. Jaffke?

A. Yes, sir.

Q. At that time you found that your views were very similar as to the corporation?

Mr. Horsley: Object.

The Court: Sustained.

Mr. Giffin: You never got any money back from the corporation?

A. No, sir.

Q. Did you make any investigation?

A. Yes, sir.

Q. Did your investigation take you all over the country?

A. Yes, sir.

Q. But you still do not know but what maybe there were assets when he died?

A. No, sir.

Mr. Giffin: That is all. (Witness excused.)

219 Mr. Horsley: I think the Court can take judicial notice of the number of claims that have been filed in this bankruptcy, well in excess of over a million dollars undisputed claims approximately 800 to 1000 claims still pending.

Mr. Bonjean: The claims you refer to are claims that arose prior to the bankruptcy.

Mr. Horsley: Correct. And the bankrupt estate is hopelessly insolvent and will not pay out.

The Court: We have a lot of important legal objections before us and I take it the better way to do this is to file briefs, and you can discuss the question of my admitting testimony and certain exhibits and make it as plain as you care to make it, and state the law as you see it. I don't think the Court can be very much confused about the facts of the money paid in. How much time do you wish?

Mr. Giffin: I think the Court will be well apprised to the law in our briefs. We can include the argument in the briefs.

The Court: Thirty days to Mr. Bonjean and ten days for Mr. Horsley's reply, if agreeable?

Mr. Bonjean: Yes, sir.

Mr. Horsley: Yes, sir.

220 The Court: Court adjourned.

(Which were all of the proceedings had in the hearing of the above entitled cause as of this date.)

Indorsed
Filed May 31, 1955
G. W. Schwaner, Clerk.

PETITIONER'S EXHIBIT NO. 1

TURNOVER ORDER OF Judge Charles G. Briggle entered July 11, 1949

222 ENTERED at Springfield, Illinois in said District this 11th day of July, 1949.

This matter coming on before the Court on the verified petition of William C. Dunham, Trustee in Bankruptcy for the Estate of Robert L. Knetzer, Bankrupt, and the Court having heard the testimony of witnesses in open court and the arguments of counsel, doth find:

1. That Robert L. Knetzer has in his possession or under his control the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) which should be turned over to the said William C. Dunham as Trustee for his bankrupt Estate as a part of the assets belonging to said bankrupt Estate at the time of the filing of the petition in bankruptcy herein, for the benefit of the creditors of the said Robert L. Knetzer.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the said Robert L. Knetzer shall forthwith pay to the said William C. Dunham, as Trustee, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00).

2. That in the event payment of said amount is not made to said Trustee on or before November 1, 1949, such fact be reported to the Court for further proceedings.

3. That the hearings on this matter have been both in the Estate of Robert L. Knetzer and Knetzer Motor Sales Co., Bankrupts, and that William C. Dunham, as Trustee for Knetzer Motor Sales Co., is not entitled to any turn over order against said Robert L. Knetzer, but that the moneys recovered hereunder shall be held by the said William C. Dunham as Trustee for the bankrupt estate of Robert L. Knetzer for the benefit of the creditors of the said Robert L. Knetzer.

/s/ Chas. G. Briggle
U. S. District Judge

PETITIONER'S EXHIBIT NO. 2

Report of Trustee and Request for Order to Show Cause of William C. Dunham, Trustee in Bankruptcy of Robert L. Knetzer

223 To the Honorable Charles G. Briggle, Judge of The District Court of The United States for the Southern District of Illinois, Southern Division, your petitioner respectfully reports:

1. Your petitioner is the duly qualified and acting trustee in bankruptcy of the above named bankrupt.

2. On to wit July 11, 1949 this honorable court entered an order directing Robert L. Knetzer, the bankrupt, to turn over and deliver to your petitioner on or before November 1, 1949 the sum of two hundred and fifty thousand dollars ($250,000.00) and further ordering your petitioner to report to this Court on or before November 1, 1949 as to whether or not such payment had been made.

3. That on to wit July 11, 1949, a copy of said order was duly served upon the said Robert L. Knetzer in the presence of his Attorney.

4. That the said Robert L. Knetzer has disobeyed said order and has failed and refused to turn over said sum of two hundred and fifty thousand dollars ($250,000.00) to your petitioner.

WHEREFORE, your petitioner prays that this honorable Court will issue an order to be served upon the said Robert L. Knetzer requiring him to appear before this Court upon a day certain to show cause why he should not be adjudged in contempt of court by reason of the facts and because of his failure to obey the order of this Court dated July 11, 1949 and that the said Robert L. Knetzer shall be committed until such time as he shall obey said order; and that your petitioner have such other and further relief as is just.

/s/ William C. Dunham
Petitioner

/s/ G. W. Horsley
505 Ill. Natl. Bank Bldg.
Springfield, Illinois
Attorney for Petitioner

STATE OF ILLINOIS }
COUNTY OF ST. CLAIR } SS.

I WILLIAM C. DUNHAM, the petitioner in the
224 foregoing petition, do hereby make solemn oath that the statements contained therein are true and correct according to the best of my knowledge, information and belief.

/s/ William C. Dunham
(Seal) Petitioner

Subscribed and sworn to before me this 1st day of November, 1949.

/s/ L. B. Diefenbach
Notary Public

PETITIONER'S EXHIBIT NO. 3

ORDER TO SHOW CAUSE

Entered by Judge Charles G. Briggle
on November 2, 1949

225 At Springfield, Illinois in said District this 2d day of November A. D. 1949.

The verified petition of William C. Dunham, Trustee herein, having been filed this date, wherein said Trustee reports to this Court that Robert L. Knetzer, Bankrupt, has failed to comply with the order of this Court under date of July 11, 1949 ordering the said Robert L. Knetzer to turn over to William C. Dunham, as Trustee, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that Robert L. Knetzer be and he hereby is, ordered to appear before the sitting judge of the District Court of the United States for the Southern District of Illinois, Southern Division, in the Federal District Court room in the Federal Court Building in Springfield, Illinois on the 15th day of November, 1949 at 10:00 o'clock A.M. to show cause why he should not be adjudged in contempt by reason of his failure to comply with the order of this Court ordering the said Robert L. Knetzer

to turn over to William C. Dunham, as Trustee, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00), and to further show cause why he should not then and there by committed to prison or otherwise dealt with until he shall obey said lawful order of this Court; and

IT IS FURTHER ORDERED that service of this Order shall be deemed sufficient if a copy thereof be served upon Philip G. Listeman, Attorney for said Robert L. Knetzer, on or before the 5th day of November, 1949.

/s/ Chas. G. Briggle
District Judge

PETITIONER'S EXHIBIT NO. 4

ORDER ADJUDGING BANKRUPT IN CONTEMPT

ENTERED December 1, 1949 together with subsequent orders endorsed thereon

226 At Springfield, Illinois, in said District, this 1st day of December, A.D., 1949.

The petition of William C. Dunham, Trustee in Bankruptcy of the above named Bankrupt, having been filed in this court asking that Robert L. Knetzer be cited to appear and show cause before this court why he should not be adjudged in contempt of court for wilful failure to comply with the order of this Court entered July 11, 1949, ordering the said Robert L. Knetzer, Bankrupt, to turn over to William C. Dunham, as Trustee, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) forthwith, and asking this Court to commit said Robert L. Knetzer, or otherwise deal with him; and notice of said hearing having been given to Philip G. Listeman, Attorney for the said Robert L. Knetzer, and the said Robert L. Knetzer being present this day in court personally, in company with his attorney, Philip G. Listeman; and the Court having heard the evidence and the arguments of counsel, and the said Robert L. Knetzer having waived the necessity of presenting detailed evidence and having failed to file an answer to the petition of the Trustee to show cause and not having presented any evidence;

And it further appearing to the Court that the said Robert L. Knetzer has wilfully disobeyed the order of this Court entered July 11, 1949, and has wilfully failed to turn over to William C. Dunham, as Trustee in Bankruptcy of the estate of Robert L. Knetzer, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00), or any part thereof, which this Court has previously found that the said Robert L. Knetzer has in his possession and should account for, and no showing having been made by the Bankrupt as to any reason why he should not be committed for his failure to comply with the said order dated July 11, 1949;

And the evidence is such as to warrant the committment of the said Robert L. Knetzer to the custody of the Attorney General of the United States for disobeying such lawful order, until he obeys such order;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said Robert L. Knetzer be, and he hereby is, held to be in contempt of Court for disobedience of the said lawful order of this Court dated July 11, 1949.

227 IT IS FURTHER ORDERED that the said Robert L. Knetzer be, and he hereby is, committed to the custody of the Attorney General of the United States for confinement in an institution of the jail type, to be confined until he shall obey the said lawful order of this Court, or until the further order of the Court.

IT IS FURTHER ORDERED that the execution hereunder be stayed until January 10, 1950.

IT IS FURTHER ORDERED that appearance bond of the said Robert L. Knetzer shall be, and the same is hereby, set at Twenty Five Thousand Dollars ($25,000.00), to be approved by the United States Commissioner for the Southern District of Illinois, Southern Division, and that the present bond previously given by the said Robert L. Knetzer for his appearance in this matter shall be, and the same is hereby, continued until the further order of this Court.

/s/ Chas. G. Briggle
District Judge

For good cause shown it is ordered that the execution heretofore stayed to Jan. 10, 1950, be further stayed to January 18th, 1950, at 10 o'clock A.M. and the appearance bond is continued in full force and effect. Dated Jan. 10, 1950.

/s/ Charles G. Briggle
U.S.D.J.

On Motion of bankrupt and for good cause shown execution further stayed to Feb. 18, 1950.

/s/ Charles G. Briggle
U.S.D.J.

15. The following shall be printed in lieu of Petitioner's Exhibits 5 through 30, inclusive:

228 "Petitioner's Exhibit 5 is a check in the amount of $1300.00, dated June 17, 1947, drawn on the Tower Grove Bank and Trust Company, St. Louis, Missouri, signed by Robert W. Jaffke and made payable to Robert L. Knetzer. The endorsement on the back side shows that it was deposited in the Edwardsville National Bank and Trust Company on June 21, 1947 and bears the stamped endorsement of Knetzer Motor Sales Co. over the written signature of Robert L. Knetzer, and above the endorsement appears, 'Deposit 1947 or 48 Buick'.

229 "Petitioner's Exhibit 6 is a receipt in words and figures as follows:

St. Louis, Mo.
No. Phone-Highland 8279 April 8, 1948

Received from Richard Jaffke
Thirteen hundred only .....Dollars

Deposit on one 1948 super 2 dr. Buick. To be delivered by April 20, 1948. Or money refunded.
$1300.00 Robert L. Knetzer

230 "Petitioner's Exhibit 7 is a check dated April 8, 1948, drawn on the Mercantile-Commerce Bank and Trust Company, payable to the order of Knetzer Motor Sales Co. in the sum of $7000.00, signed by Robert W. Jaffke, deposited in the Edwardsville National Bank and Trust

Company on April 8, 1948, endorsed by rubber stamp of Knetzer Motor Sales Co. over the signature of Robert L. Knetzer. Said Exhibit contains the notation, 'Deposit on Farmall "M" Tractors'.

231 "Petitioner's Exhibit 8 is a receipt in words and figures as follows:

6454 Marmaduke
St. Louis, Mo.
No. Phone - Hi 8279 April 8, 1948

Received from Robert W. Jaffke
Ten Thousand only .....Dollars

231 Deposit on ten new Farmall 'M' tractors. To be delivered by April 20, 1948 in Omaha, Nebr. Or money refunded.
$10,000.00 Robert L. Knetzer

232 "Petitioner's Exhibit 9 is a check dated March 24, 1948, drawn on the Tower Grove Bank and Trust Company in the amount of $3000.00, payable to the order of Knetzer Motor Sales Co. and signed Robert W. Jaffke. Said check was deposited in the Edwardsville National Bank and Trust Company on March 24, 1948, endorsed by rubber stamp Knetzer Motor Sales Co. over the signature of Robert L. Knetzer, and bears the following notation, 'Deposit on 3 new Farmal "M" Tractors'.

233–244 "Petitioner's Exhibit 10 is an account book with the Mercantile-Commerce Bank and Trust Company in the name of Robert W. or H. C. Jaffke, 6454 Marmaduke, bearing notation, 'Either or Survivor'. Said pass book shows the following deposits: (It is proposed that the printer will print the date and amount of each deposit as shown in said pass book, rather than reproduce each page of said pass book.)

Apr. 8, 1948	$ 658.28	July 27, 1948	350.76
Apr. 8, 1948	10,000.00	July 29, 1948	3,500.00
Apr. 20	3,170.51	Aug. 9, 1948	1,074.75
Apr. 26, 1948	1,091.70	Aug. 16	172.50
May 13	867.69	Aug. 26, 1948	272.00
June 3, 1948	1,013.34	Aug. 16	1,500.00

June 17	4,878.25	Aug. 20	1,500.00
June 17, 1948	4,000.00	Aug. 25	3,921.00
June 24	3,789.33	Sept. 10	803.80
July 12	910.43	Sept. 17, 1948	1,325.98
July 23, 1948	2,000.00	Oct.	988.08
Oct. 7, 1948	2,563.39	Feb. 23	2,000.00
Oct. 29	9,399.77	Mar. 8	854.52
Nov. 5, 1948	8,200.00	Mar. 16	954.75
Nov. 26	3,406.00	Mar. 21	500.00
Dec. 7, 1948	527.22	Mar. 24	715.63
Dec. 21, 1948	3,379.60	Mar. 28	3,407.36
Dec. 29, 1948	460.00	Apr. 15	1,435.96
Jan. 7, 1949	1,736.43	Apr. 29	800.47
Jan. 10, 1949	2,000.00	May 18	1,497.45
Jan. 21	3,325.02	June 9	1,231.35
Jan. 27	7,000.00	June 17, 1949	938.85
Feb. 4, 1949	12,012.04		
June 30	1,696.18	Sept. 6	450.00
July 6	330.65	Sept. 14	3,771.35
July 7	1,239.17	Sept. 16	2,949.36
July 21	1,500.00	Sept. 23, 1949	2,876.26
July 28	788.55	Oct. 14, 1949	1,697.44
Aug. 10, 1949	968.34	Oct. 28, 1949	5,088.41
Aug. 15	869.90	Oct. 31	6,092.46
Aug. 17	2,000.00	Nov. 22, 1949	934.40
Aug. 18, 1949	1,125.75	Dec. 6	11,400.00
Sept. 2	264.41	Dec. 16	1,311.46
Sept. 9, 1949	3,000.00	Dec. 28	394.07
Jan. 5, 1950	3,899.88	Mar. 15, 1950	2,000.00
Jan. 10	572.50	Mar. 21	346.90
Jan. 13	6,210.37	Mar. 27, 1950	380.14
Jan. 19, 1950	4,000.00	Apr. 4, 1950	922.16
Jan. 24, 1950	1,057.13	Apr. 7, 1950	529.69
Feb. 7, 1950	764.84	Apr. 7, 1950	2,000.00
Feb. 16	445.72	Apr. 14, 1950	6,947.35
Mar. 1, 1950	238.60	Apr. 28, 1950	783.77
Mar. 1, 1950	12,000.00	May 4, 1950	1,044.34
Mar. 3, 1950	887.50	May 16	374.09
Mar. 7, 1950	638.44	May 22, 1950	520.74

May 29, 1950 ...	1,769.86	Aug. 22, 1950 ...	716.25
June 2, 1950	415.16	Sept. 13, 1950 ..	626.78
June 5, 1950	3,000.00	Sept. 15	2,857.15
June 12, 1950 ...	1,029.62	Sept. 21, 1950 ..	6,964.28
June 29	378.13	Oct. 16	1,116.71
June 29	5,979.49	Oct. 2	3,669.50
July 11, 1950 ...	964.50	Oct. 15	1,775.07
July 12, 1950 ...	716.00	Nov. 16, 1950	5,000.00
July 14, 1950 ...	360.00	Nov. 27	1,356.14
July 14, 1950 ..	1,000.00	Dec. 7, 1950	530.87
Aug. 11	1,078.36	Dec. 7, 1950	2,000.00
Aug. 18	6,047.50		
Dec. 7, 1950	3,500.00	Feb. 19, 1951 ...	239.52
Dec. 18, 1950	799.87	Mar. 14, 1951 ...	1,300.88
Dec. 20	3,967.90	Mar. 22, 1951 ...	3,564.00
1951		Mar. 26	367.22
Jan. 3	4,948.10	Apr. 2, 1951	1,426.00
Jan. 3	569.33	Apr. 17, 1951 ...	695.38
Jan. 4	818.98	May 3, 1951	769.36
Jan. 8, 1951	470.10	May 7	578.85
Jan. 22, 1951	459.36	May 9	2,300.00
Jan. 30	1,709.80	May 21, 1951 ...	635.51
Feb. 6, 1951	765.51	June 4, 1951	983.49
June 6, 1951	5,379.10	Aug. 27, 1951 ...	247.17
June 8	601.50	Sept. 5, 1951	510.72
June 18, 1951 ...	969.73	Sept. 8, 1951	396.59
June 18	4,864.50	Sept. 19, 1951 ..	692.10
June 28, 1951 ...	474.34	Sept. 24, 1951 ...	267.75
July 9, 1951	1,233.86	Oct. 4	315.25
July 13, 1951 ...	1,764.38	Oct. 16	511.52
Aug. 3, 1951	795.58	Oct. 19	1,137.10
Aug. 10, 1951 ...	1,254.50	Oct. 22, 1951 ...	1,542.00
Aug. 14	121.58	Oct. 25, 1951	2,820.00
Aug. 17, 1951 ..	272.26	Oct. 30, 1951 ...	465.30
Nov. 2, 1951	265.02	Jan. 22, 1952	425.50
Nov. 13	575.69	Jan. 31	1,249.86
Nov. 20	509.00	Feb. 8	465.33
Nov. 26	705.00	Mar. 4	525.78

Dec. 3	242.14	Mar. 12	649.50
Dec. 7, 1951	335.58	Mar. 14, 1952	462.75
Dec. 18	510.98	Mar. 27	365.78
Dec. 24	424.50	Apr. 4, 1952	515.97
Dec. 31, 1951	3,700.00	Apr. 25	851.26
Dec. 31, 1951	389.92	May 5	1,588.08
Jan. 7, 1952	1,750.33	May 14, 1952	609.08
Jan. 11, 1952	801.39	May 19, 1952	733.00
June 11, 1952	863.30	Sept. 9, 1952	717.83
June 25, 1952	1,069.55	Sept. 15, 1952	445.94
July 7	1,214.01	Sept. 29, 1952	577.17
July 9, 1952	11,599.25	Oct. 10, 1952	392.80
July 28, 1952	1,439.19	Oct. 24	349.12
Aug. 6, 1952	1,341.17	Nov. 6, 1952	699.03
Aug. 12	212.15	Nov. 7	354.38
Aug. 28	750.47	Nov. 20	2,229.13
Aug. 28	700.00	Dec. 3, 1952	1,074.65
Aug. 29	5,000.00	Dec. 24	1,495.25
1953		Mar. 27, 1953	18,894.70
Jan. 2	507.95	Apr. 3, 1953	945.89
Jan. 8	575.33	May 12	1,200.25
Jan. 13	701.25	May 18, 1953	1,133.58
Feb. 2, 1953	1,087.04	June 8	523.20
Feb. 9	200.83	June 19, 1953	538.14
Feb. 18	817.40	June 24, 1953	400.00
Feb. 27, 1953	1,315.78	July 1, 1953	5,616.57
Mar. 9	751.87	July 1	375.20
Mar. 17	19,361.09	Aug. 4, 1953	1,487.58
Mar. 10	9,000.00		
Aug. 21, 1953	1,272.25	Nov. 23, 1953	3,463.75
Aug. 24, 1953	1,500.00	Dec. 7	555.29
Sept. 9, 1953	541.54	Dec. 18, 1953	2,295.79
Sept. 16	2,078.87	Dec. 28	1,520.28
Sept. 29	258.71	Jan. 4, 1954	6,500.00
Sept. 29	260.00	Jan. 13	441.46
Oct. 6, 1953	1,662.31	Jan. 19	4,841.12
Oct. 14, 1953	237.18	Feb. 3, 1954	10,296.39
Oct. 20	5,275.25	Feb. 5	6,270.80
Oct. 23	376.07	Feb. 18, 1954	800.03
Nov. 13	4,538.40	Mar. 17, 1954	3,994.40

245 "Petitioner's Exhibit 11 is a check dated December 7, 1950, drawn on the Mercantile-Commerce Bank and Trust Company in the amount of $3800.00, payable to the order of Robert W. Jaffke and signed Robert W. Jaffke. Said check also endorsed Robert W. Jaffke.

246 "Petitioner's Exhibit 12 is a check dated December 7, 1950, drawn on the Mercantile-Commerce Bank and Trust Company in the amount of $2300.00, payable to Robert W. Jaffke and signed Robert W. Jaffke. Said check also endorsed by Robert W. Jaffke.

247–
248 "Petitioner's Exhibit 13 is a bank statement of Robert W. Jaffke or H. C. Jaffke, 6454 Marmaduke Ave., St. Louis, Missouri, in account with Mercantile-Commerce Bank and Trust Company, St. Louis, Missouri, showing the following transactions:

Checks and Other Debits		Credits	Date	Ledger Entries	Daily Balance
Balance from Last Statement			Nov. 13 '50		1,715.96
90.00			Nov. 14 '50	1	1,625.96
		1,775.07	Nov. 15 '50	1	3,401.03
5,000.00		5,000.00	Nov. 16 '50	2	3,401.03
156.00	30.00		Nov. 17 '50	2	3,215.03
11.00			Nov. 20 '50	1	3,204.03
27.00	267.40		Nov. 21 '50	2	2,909.63
14.25	6.25		Nov. 22 '50	2	2,889.13
8.29	100.00				
123.12			Nov. 24 '50	3	2,657.72
136.20	271.83	1,356.14	Nov. 27 '50	3	3,605.83
50.00			Nov. 28 '50	1	3,555.83
360.00			Nov. 29 '50	1	3,195.83
74.45			Dec. 6 '50	1	3,121.38
3,800.00	2,300.00	530.87			
		3,500.00			
		2,000.00	Dec. 7 '50	5	3,052.25
765.62			Dec. 8 '50	1	2,286.63
166.33	7.82				
27.00	34.57				
2.00			Dec. 11 '50	5	2,048.91
2.00			Dec. 12 '50	1	2,046.91

"Petitioner's Exhibit 14 is a package of 36 checks, all drawn on the Mercantile-Commerce Bank and Trust Company, or Mercantile Trust Company (designated by star) St. Louis, Missouri, all payable to E. B. Dierkes, drawn on the account of Robert W. or H. C. Jaffke and signed Robert W. Jaffke, and all endorsed on the back by E. B. Dierkes. The following is descriptive of the date, amount and any additional information contained on said checks:

249 Ck. No. 54—January 31, 1951 — $108.32 — marked 'Int. on Loan 12/13-2/13/51'

Ck. No. 95 — March 23, 1951 — $2572.00 — marked 'A/C Principal $2500—Int. 2/13-3/23 $72.00'

250 *Ck. No. 969—Oct. 23, 1953—$40.83—marked 'Int. to 10/23/53'

*Ck. No. 985—Nov. 20, 1953—$2340.83—marked 'Int. to 11/23/53 $40.83 — Acct. of principal 11/23/53 $2300.00'

251 *Ck. No. 803—Aug. 6, 1953—$481.66—marked 'Int. to 8/23/53 $81.66—Principal $400.00'

*Ck. No. 935—Sept. 25, 1953—$40.83—no markings

252 *Ck. No. 724—May 7, 1953 — $81.66 — marked 'Int. 3/23-5/23/53'

*Ck. No. 764—June 23, 1953—$40.83—no markings

253 *Ck. No. 1058—Feb. 5, 1954 — $6613.00 — marked 'RWJ & Jarabek loan So Dakota'

*Ck. No. 1164—June 29, 1954—$300.00—marked 'Balance in full on collateral loans'

254 *Ck. No. 661—Feb. 26, 1953—$40.83—marked 'Int. to 2/23/53'

*Ck. No. 701—March 30, 1953—$40.83—marked 'Int. to 3/23/53'

255 *Ck. No. 1052—Feb. 2, 1954—$29.58—marked 'Int. to 1/23/54'

*Ck. No. 1012—Dec. 22, 1953—$29.58—marked 'Int. to 12/23/53'

256 Ck. No. 180—June 23, 1951—$63.75—marked

'Kreft Int. 7/13 4620 So. 39th $20.00
RWJ Int. 5/23-6/23/51. 43.75

63.75'

Ck. No. 211—Aug. 3, 1951—$43.75—no markings.

257 Ck. No. 225—Aug. 23, 1951—$43.75—no markings.

Ck. No. 248—Sept. 25, 1951—$43.75—marked 'Interest 8/23-9/23/51'

258 Ck. No. 121—April 20, 1951—$43.75—marked 'Int. to 4/23/51'

Ck. No. 152—May 22, 1951—$43.75—marked 'Int. to 5/23/51 on Coll. loan.'

259 Ck. No. 274—Oct. 24, 1951—$43.75—marked 'Interest to 10/23/51'

Ck. No. 294—Nov. 26, 1951—$43.75—marked 'Interest to 11/23/51'

260 *Ck. No. 374—Feb. 27, 1952—$43.75—marked 'Int. to 2/23/52'

*Ck. No. 396—March 26, 1952—$43.75—marked 'Int. to 3/23/52'

261 *Ck. No. 453—June 23, 1952—$43.75—marked 'Int. to 6/23/52'

*Ck. No. 492—July 26, 1952—$43.75—marked 'Int. to 7/23/52'

262 *Ck. No. 562—Oct. 28, 1952—$43.75—no markings

*Ck. No. 592—Dec. 1, 1952—$743.75—marked 'Int. to 11/23 $43.75—A/C Prin. 700.00'

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263 *Ck. No. 356—Jan. 28, 1952—$43.75—marked 'Int. to 1/23/52'

*Ck. No. 318—Dec. 26, 1951—$43.75—marked 'Int. to 12/23/51'

264 *Ck. No. 417—April 28, 1952—$43.75—no markings

*Ck. No. 438—May 28, 1952—$43.75—marked 'Int. to 5/23/52'

265 *Ck. No. 514—Aug. 27, 1952—$43.75—marked 'Int. 7/23-8/23/52'

*Ck. No. 535—Sept. 27, 1952—$43.75—marked 'Int. to 9/23'

266 "Ck. No. 613—Dec. 23, 1952—$41.50—marked 'Int. to 12/23/52'

"Ck. No. 643—Jan. 24, 1953—$40.83—marked 'Int. to 1/23/53'

267–
268 "Petitioner's Exhibit 14-A is a collateral note signed by Robert W. Jaffke, dated December 7, 1950, promising to pay to the Mercantile-Commerce Bank and Trust Company of St. Louis, Missouri the sum of $2000.00 with interest at 4%, either on demand or on March 15, 1951, secured by collaterals in the Trust Company's possession or substitutions thereafter. On the back of said note it appears that interest was paid to December 31, 1950 and also to January 31, 1951. On the face of the note, over the signatures, there is a stamp which indicates that the note was paid by renewal.

269 "Petitioner's Exhibit 15 is a demand note signed by Robert W. Jaffke payable to the order of E. B. Dierkes dated December 13, 1950, promising to pay $13000.00 with interest at 8%, secured by deed of trust on 6454 Marmaduke $3500.00; deed of trust on S. D. Farm (Jarabek) $7000.00; deed of trust on S. D. Farm (Jarabek) $1700.00; Chattel Mortgage $676.50; total $12,876.50. Said note is endorsed 'Without Recourse on me. E. B. Dierkes' and shows payments $2500.00 3/23/51; $700.00 12/1/52; $2300.00 11/2/53; $400.00 8/6/53. Said note is marked 'Paid in full' without the date of the final payment being marked thereon.

270–
271 "Petitioner's Exhibit 15 (apparently numbered 15 by error, but is in the record immediately following the other Petitioner's Exhibit 15) is a collateral note dated December 7, 1950, signed by Robert W. Jaffke, promising to pay $3500.00 with interest at 4% on or before March 15, 1951 to the order of the Mercantile-Commerce Bank and Trust Company, and is secured by collateral in the possession of the Trust Company. On the reverse side it shows interest paid to December 31, 1950 and also to January 31, 1951. Over the signature on the note it appears that it was paid by renewal.

272–
273 "Petitioner's Exhibit 16 is a collateral note signed by Robert W. Jaffke dated December 13, 1950, promising to pay $13000.00 on or before January 13, 1951 to E. B. Dierkes with interest at 5%, secured by '$7000.00 1st D/T from Jarabek to Jaffke on 160 acres Sanborn Co., S. D.; $1700.00 2nd D/T from Jarabek to Jaffke on 160 acres Sanborn Co., S.D.; $676.50 Chattel Mortgage from Jarabek to Jaffke; $3500.00 1st D/T from H. C. Jaffke to Tobey on 6454 Marmaduke Ave.; $5000.00 personal note from A. F. Chapman to R. Jaffke for money advanced on four duplex buildings in San Diego, California; $12000.00 personal note from A. F. Chapman to R. Jaffke for money advanced on buildings in San Diego, California'. Over the signature it is marked 'Paid in full'. On the reverse side it shows $108.32 interest paid 12/13–2/13/51; $72.00 interest paid 2/13–3/23/51; $2500.00 principal paid 3/23/51; $700.00 principal paid 12/1–52; $400.00 principal paid 8/6/53; $2300.00 principal paid 11/20/53; $6600.00 principal paid 2/5/54.

274–
275 "Petitioner's Exhibit 16 (this appears to be a duplicate of the other Petitioner's Exhibit 16) is not signed. On the reverse side of this note interest payments are shown each and every month through February 5, 1954 and commission of $500.00 paid on June 29, 1954, and shows the same principal payments as heretofore mentioned in connection with the other Petitioner's Exhibit 16.

276 "Petitioner's Exhibit 17 is a deposit slip of Robert W. Jaffke in the Mercantile-Commerce Bank and Trust Company dated 3/22/51 showing items left for collection of $3500.00, $27.00 and $37.00, total $3564.00. Also as a part of the same exhibit is a cash receipt ticket dated 3/15/51 in the amount of $151.50 for rent from all tenants at 5316 Quincy Street; also a cash receipt showing a payment from Fred H. Beck for D/T 6454 Marmaduke Avenue in the amount of $3500.00; also cash receipts collection dated 3/20/51 from Mayme Sucker for 6307 Theodosia Ave. in the amount of $27.00.

277 "Petitioner's Exhibit 18 is a note dated December 21, 1950 payable to Laura Downing in the amount of $500.00 with interest at 8% 3 months after date, signed by Robert W. Jaffke and Aurelia A. Jaffke. Said note merely has the word 'Paid' written across the face of it. On the back of the note it appears that it was endorsed 'Without Recourse on me. Laura Downing' and appears to have been released on 7/18/51.

278-281 "Petitioner's Exhibit 19 is a Deed of Trust signed by Robert W. Jaffke and Aurelia A. Jaffke, his wife, to secure the note mentioned as Petitioner's Exhibit 18, and appears to have been released on 7/18/51.

282 "Petitioner's Exhibit 20 is a check payable to Robert W. Jaffke in the amount of $2500.00, dated December 20, 1950, drawn on the Manufacturers Bank & Trust Company of St. Louis, and signed by Geo. Paul. On the back of said check it bears only the endorsement Robert W. Jaffke.

282 "Petitioner's Exhibit 21 is a check payable to Robert W. Jaffke in the amount of $1000.00, dated December 29, 1950, drawn on the Mercantile-Commerce Bank and Trust Company of St. Louis, and signed by Clarence L. Miller. On the back of said check it bears only the endorsement Robert W. Jaffke.

283 "Petitioner's Exhibit 22 is a check payable to Robert Jaffke in the amount of $1000.00 dated December 29, 1950, drawn on the Mississippi Valley Trust Company, St. Louis, Mo., said check being made on the Royce Products Company, 900 S. Seventh, St. Louis 2, Mo. account and signed by E. M. Koetkamp. On the back of said check appears only the endorsement Robert Jaffke.

284-287 "Petitioner's Exhibit 23 is a Deed of Trust signed by Robert W. Jaffke and Aurelia A. Jaffke, his wife, dated January 2, 1951, running to Wm. H. Jaffke as Trustee for Mary Boka and Clara B. Wills, to secure the payment of a note for $8000.00 dated March 2, 1951. Said instrument does not purport to show any recording nor any payment or release.

288 "Petitioner's Exhibit 24 was stricken by the Court's order of April 15, 1955, but is found at page 288 of the original transcript of record.

289 "Petitioner's Exhibit 25 is a check payable to Robert W. Jaffke in the amount of $1000.00, dated April 1, 1953, drawn on the Mercantile Trust Company, and signed by Robert W. Jaffke, as well as endorsed by Robert W. Jaffke. Said check bears the notation 'For Adolph Bohn'.

290 "Petitioner's Exhibit 26 is a receipt in words and figures as follows:

'April 1, 1953

Received of Robert W. Jaffke
One Thousand and no/100.....Dollars
100
To be paid to Adolph H. Bohnn
TRALLES, HOFFMEISTER & GILPIN
$1000.00 By Carroll C. Gilpin'.

290 "Petitioner's Exhibit 27 is a note dated December 6, 1950 payable to R. W. Jaffke in the amount of $7000.00 with interest at 8% twelve months after date, signed by Robert L. Knetzer, said note being payable at St. Louis, Mo. and being due December 6, 1951.

290 "Petitioner's Exhibit 28 in a receipt in words and figures as follows:

'Date Dec. 22, 1950

Received of Robt. W. Jaffke
Thirty five thousand one hundred dollars ($35,100.00), money loaned to me in cash, to be accounted for by December 28, 1950
$35,100.00 Robert L. Knetzer'

291–
301 "Petitioner's Exhibit 29 is a transcript of proceedings had in the chambers of Honorable Charles G. Briggle, U. S. District Judge, on March 11, 1952, and is found at pages 291 through 301 of the original transcript of record. By his order of April 15, 1955, Judge J. Leroy Adair allowed defendant trustee's motion to strike said

record of proceedings and therefore, same are not reproduced herein.

302–
305 "Petitioner's Exhibit 30 is a copy of a criminal indictment returned against the bankrupt, Robert L. Knetzer, and is shown at pages 302 through 305 of the original transcript of record. By his order of April 15, 1955 Judge J. Leroy Adair allowed the Trustee's motion to strike said exhibit and same is not reproduced herein."

DEFENDANT'S EXHIBIT NO. 1

Letter of G. W. Horsley, Attorney for William C. Dunham Trustee in Bankruptcy of Robert L. Knetzer, Bankrupt dated January 27, 1950 to all creditors of Robert L. Knetzer and Knetzer Motor Sales Co.

306 TO ALL CREDITORS OF ROBERT L. KNETZER and KNETZER MOTOR SALES CO.:

This letter is long overdue, but this can partly be explained by the fact that every time I got ready to send out a letter there was some matter that was in process and it was hoped that in a few days a complete report could be made. However, since it appears that it will be a long time before we will arrive at a place where any report can be complete, this letter is going out to bring the creditors up to date on what has happened in both of these bankruptcies.

In the matter of Robert L. Knetzer all of the assets, consisting of personal and real property, have been sold, and the Trustee now has on hand a little over $74,000.00. The only other money to be received from the sale of personal property has to do with Crandall Creek properties which were sold for $16,500.00. Five Thousand Dollars was paid down but this transaction has not as yet been completed. This deal may fall through but at any rate, some additional money will be received from the furniture and other items in Wyoming.

Federal Judge Charles G. Briggle has ordered Robert L. Knetzer to pay to the Trustee the sum of $250,000.00.

Only a very small portion of this has been paid, which is included in the above amount on hand. Mr. Knetzer has promised to make a substantial payment on or before February 18, 1950 and Judge Briggle has continued the citation until that date, at which time further action will be taken.

Other than the foregoing, the only assets that we can hope to recover consist of refunds made to creditors, which in our opinion, constitute a preference of such creditors. Only last week did we complete hearings before Judge Briggle where we examined various creditors. It will now be our job to start filing lawsuits against these creditors trying to recover the money paid to them during the four months period prior to bankruptcy. There is a lot of money involved in this matter and we hope to have considerable success in recovering these payments for the benefit of all of the creditors. However, this is going to take considerable time and will necessitate a lot of litigation. We sincerely believe that this will result in recovery of quite a bit of money for the creditors.

In the matter of Knetzer Motor Sales Co. we have on hand approximately $41,000.00. Of course, this fund belongs only to the creditors of Knetzer Motor Sales Co. Many creditors have filed in both bankruptcies and the matter of whether or not claims will be allowed in both has not been legally and finally determined but ruling on this should be made very shortly. It is only my personal opinion that those creditors who made their checks payable to Knetzer Motor Sales Co. and thought they were dealing with the corporation will have their claims allowed in both bankruptcies. By the same token, those who dealt only with Robert L. Knetzer will have claims allowed only against Robert L. Knetzer.

In the Knetzer Motor Sales Co. bankruptcy we do not have the matter of recovery of preferences by way of refunds to creditors, but we are contemplating filing one large lawsuit which we prefer not to discuss in this letter at the present time for obvious reasons.

With regard to the claims filed:

A. In the matter of Robert L. Knetzer there have been 335 claims filed totaling $3,844,776.54. One of these claims is by the State of Illinois for $20,189.82 representing sales taxes, which said claim is being resisted because we do not feel that that much money is due and owing. However, if that claim is allowed it will be a preferred claim for taxes and will come out of the monies on hand before payment to the creditors.

307 The Trustee of the Bankrupt Estate of Arthur F. Kramer has filed a claim in the amount of $2,991,000.00. We have filed objections to this claim and will resist it to the fullest extent. How much money the creditors ultimately will get depends pretty much on whether or not this claim is allowed. It may take as long as a year before this matter is finally settled by the Courts.

In addition to the foregoing we have received in the last few days a notice from the Federal Collector of Internal Revenue of a claim for $2,226,000.00 on income taxes for the year 1948. In my opinion this claim is ridiculous and we should be able to defeat it, but it will have to be litigated. It must be remembered that any tax claim is a preferred claim and is *paid in full* as far as the money will go, to the exclusion of all other creditors.

B. In the matter of Knetzer Motor Sales Co. there have been 415 claims filed totaling $3,524,990.13. Of these claims a total of $2,428.27 represents wages and taxes which are preferred claims and which will be paid before those of the other creditors.

The Trustee for Arthur F. Kramer also filed a claim in the amount of $2,991,000.00 against Knetzer Motor Sales Co. It is only my own personal opinion but I believe this claim can be defeated so far as Knetzer Motor Sales Co. is concerned. However, this will have to be litigated through the courts and it will be many months before we will know the answer to this.

In the meantime we are proceeding to allow or disallow all claims, which job should be completed in the next few

weeks. However, in the event claims are allowed or disallowed either side wil have the right to take an appeal which will mean a long delay. It is doubtful if any dividend will be paid to any creditors for some time, but just as soon as all tax claims and preferred claims can be disposed of, then it may be possible to pay a small dividend, even though litigation is still going on with regard to the Kramer claim and possibly some other large claims.

Many creditors have written asking about deducting the loss from their income tax. This should be taken up by you with your local Collector of Internal Revenue. Our Springfield Collector has ruled that anyone engaged in the business of buying or selling automobiles can deduct 80% of the loss for the year 1948—the other 20% will be adjusted as of the date when the bankruptcy is closed. Any individual not engaged in the automobile business can only take a loss at the time the bankruptcy is closed and the final dividend paid. However, in making out your income tax return we can only suggest that you follow the ruling of your local Collector of Internal Revenue.

This letter has been lengthy but I have tried to answer all of the questions contained in the hundreds of letters received by both Mr. Dunham and myself which time will not permit us to answer personally. If this letter does not answer your questions, please feel free to write again and I will try to give you a personal reply.

This letter is written on behalf of both Mr. William C. Dunham, the Trustee, and myself as his attorney.

Very truly yours,

/s/ G. William Horsley
G. William Horsley

GWH:ih

FINDING OF FACT AND CONCLUSIONS OF LAW—IN RE HEARING ON PETITION OF ROBERT W. JAFFKE TO RECOVER FUNDS FROM WILLIAM C. DUNHAM, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF ROBERT L. KNETZER, BANKRUPT

308 (Entered on April 18, 1955.)

309 This is a suit brought upon a petition of Robert W. Jaffke addressed to this court, sitting in Bankruptcy, for the recovery of Thirty-six Thousand Dollars ($36,000.00) of petitioner's money from William C. Dunham, the trustee in the above captioned bankruptcy. Petitioner contends that the afore-mentioned sum was fraudulently obtained from him by Robert L. Knetzer, subsequent to his adjudication in Bankruptcy, and was paid over by said bankrupt to his said trustee, without the knowledge or consent of petitioner; and, said sum is being wrongfully withheld by the trustee in bankruptcy from petitioner since said sum is no part of the assets of the estate of said bankrupt but was property fraudulently acquired by the bankrupt after his adjudication in Bankruptcy.

FINDINGS OF FACT

1. That on October 21, 1948, one Robert L. Knetzer was adjudicated a bankrupt by this court; that on December 15, 1948, William C. Dunham was appointed and qualified as trustee of said bankrupt's estate; that on July 11, 1949, a turnover order was entered in said bankruptcy directing the bankrupt, Robert L. Knetzer, to pay to said trustee, William C. Dunham, the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00), wrongfully withheld from his bankrupt estate; and, that on December 1, 1949, a contempt citation was entered in this court against the said Robert L. Knetzer for his failure to comply with said turnover order; and thereafter on March 28, 1950, he was remanded to the custody of the United States Marshal and confined in jail.

2. That William C. Dunham, trustee in the above-captioned bankruptcy, represents in this suit the interests, if any, of the bankrupt's creditors prior to the bankruptcy, whose claims in this court were occasioned by the said bankrupt's business before his bankruptcy of selling automobiles and are based on his failure to return their
310 deposits on orders for certain automobiles that were never delivered to them.

3. That the time period, pertinent to this suit, includes the period from December 6, 1950, to November 1, 1951;

and during this period, the bankrupt, Robert L. Knetzer, upon his release from confinement in jail, attempted to purge himself of the contempt citation by making installment payments to his trustee in bankruptcy, the respondent, William C. Dunham.

4. That during the same period after his adjudication as a bankrupt, and at the time of making such installment payments to said trustee, the bankrupt, Robert L. Knetzer, obtained large sums of money from petitioner, Robert W. Jaffke, by means of fraud and misrepresentation; and that the sum of Twenty-seven Thousand Four Hundred Dollars ($27,400.00) of the monies so obtained by the said bankrupt from petitioner was delivered over to his said trustee in bankruptcy, the respondent, William C. Dunham.

5. That the respondent, William C. Dunham, in his capacity as trustee of the bankrupt's estate, has possession of the said sum of Twenty-Seven Thousand Four Hundred Dollars ($27,400.00) which he has refused to return to the petitioner on petitioner's demand for its return to him as property wrongfully taken from him.

CONCLUSIONS OF LAW

1. That courts of bankruptcy proceed upon equitable principles, and the equities in this case are with the Petitioner.

2. That the bankrupt, Robert L. Knetzer, obtained the sum of Twenty-seven Thousand Four Hundred Dollars ($27,400.00) from the petitioner, after said bankrupt's adjudication in bankruptcy, by means of fraud and misrepresentation, which sum is now in the possession of the respondent trustee, William C. Dunham.

3. That the said sum of Twenty-seven Thousand Four Hundred Dollars ($27,400.00) constitutes after acquired property and is not a part of the bankrupt, Robert L. Knetzer's estate in bankruptcy; hence, is not property to which the trustee, William C. Dunham, is lawfully entitled to as representative of the general creditors of the
311 said bankrupt's estate and as such should be returned to its rightful owner, the petitioner, Robert W. Jaffke.

4. Defendant-Trustee heretofore moved to strike the evidence of Petitioner because of the death of the bankrupt Knetzer; said objection is overruled and Motion to Strike is overruled;

5. Defendant-Trustee objects to the affidavit of Knetzer made in August of 1952; objection sustained, and Motion to Strike sustained.

6. Defendant-Trustee moves to strike the record of proceedings before Judge Briggle; Motion to Strike allowed.

7. Defendant-Trustee's objection to the Indictment against the bankrupt Knetzer for fraud—objection sustained, and Motion to Strike sustained.

8. Defendant-Trustee's objection to Petitioner's Exhibits No. 27 and 28 being a Note and Receipt, from Knetzer to Petitioner Jaffke—objection overruled.

JUDGMENT ORDER

This cause now coming on to be heard by the Court without a jury, upon the issues joined in said cause, and the Court having heard and considered the evidence submitted by the parties hereto, including the several exhibits which are accepted in evidence, and having adopted Findings of Fact and Conclusions of Law with respect to said issues, and having now heard the arguments of counsel and considered the briefs submitted by the parties hereto, and the Court being now fully advised in the premises, DOTH FIND: The issues herein for the Petitioner, Robert W. Jaffke.

THEREFORE, it is considered and ORDERED by the Court that the petitioner do have and recover of and from the respondent, William C. Dunham, in his official capacity as trustee, the sum of Twenty-seven Thousand Four Hundred Dollars ($27,400.00).

Dated this 15th day of April, A. D. 1955.

/s/ J. Leroy Adair
United States District Judge

Indorsed
Filed Apr. 18, 1955
G. W. Schwaner, Clerk.

NOTICE OF APPEAL

312 (Filed on April 21, 1955.)

313 TO: Wanless, Craven & Giffin
First National Bank Building
Springfield, Illinois

Roscoe Bonjean
501 Myers Building
Springfield, Illinois

S. S. DuHamel
414 Illinois Building
Springfield, Illinois

ATTORNEYS FOR ROBERT W. JAFFKE.

Notice is hereby given that William C. Dunham, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, Bankrupt, Respondent in the above entitled matter, hereby appeals to the United States Court of Appeals for the Seventh Circuit, from the judgment order entered by the Honorable J. Leroy Adair on the 15th day of April, A.D., 1955, wherein it was ordered that the Petitioner, Robert W. Jaffke, recover from the Respondent, William C. Dunham, in his official capacity as Trustee, the sum of Twenty Seven Thousand Four Hundred Dollars ($27,400.00).

/s/ G. W. Horsley
G. W. Horsley, Attorney

for Respondent William C. Dunham, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, Bankrupt

Indorsed
Filed Apr. 21, 1955
G. W. Schwaner, Clerk.

314– On April 25, 1955, Defendant-Trustee gave notice
323 of presentment of motion for supersedeas; said motion was filed on April 25, 1955 and on said date a certified check was deposited in the amount of $29,000.00 with G. W. Schwaner, Clerk of the U.S. District Court,

Southern District of Illinois, Southern Division, and upon presentment of supersedeas bond in the amount of $29,000.00, after due proof of service upon attorneys for Petitioner, said supersedeas bond was approved and stay of enforcement of judgment pending the disposition of the appeal, all entered on April 25, 1955; on May 3, 1955, U.S. District Judge Adair extended the time for filing the designation of the record and statement of points to and including May 31, 1955, and the time for docketing and filing of the record in the U.S. Court of Appeals to and including June 30, 1955.

STATEMENT OF POINTS

324 (Filed on May 31, 1955)

325 Now comes WILLIAM C. DUNHAM, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, Bankrupt, Respondent in the above entitled matter; Appellant herein, and files the following statement of points on which he intends to rely on appeal from the order entered in this proceeding on the 15th day of April, 1955, and judgment thereon in favor of the Petitioner, Robert W. Jaffke, to-wit:

I.

Findings of Fact and Conclusions of Law In Re Hearing on Petition of Robert W. Jaffke to Recover Funds from William C. Dunham, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, Bankrupt, and Judgment Order, a part thereof, entered by the Honorable J. LeRoy Adair on April 15, 1955 and filed in this Court on April 18, 1955:

1. Finding of Fact No. 2 is contrary to the evidence in that many pending claims are based upon matters not involving deposits on cars and, for the further reason that the Respondent and Appellant also represents, in this proceeding, the widow and heirs of the deceased bankrupt.

2. Finding of Fact No. 3 is contrary to the evidence in that the time period is broader in scope than just from December 6, 1950 to November 1, 1951.

3. Finding of Fact No. 4 is contrary to the evidence in that the Petitioner did not prove that Robert L. Knetzer

obtained large sums of money from him by means of fraud and misrepresentation, and in that the evidence absolutely does not disclose nor prove that the sum of Twenty Seven Thousand Four Hundred Dollars ($27,400.00) or any sum of money, which was obtained by the Bankrupt from the Petitioner, was duly delivered over to the Respondent-Appellant.

4. Finding of Fact No. 5 is contrary to the evidence in the record in that the Petitioner did not prove that the Respondent has in his possession Twenty Seven Thousand Four Hundred Dollars ($27,400.00), or any sum of money, which belongs to the Petitioner.

5. Conclusion of Law No. 1 is contrary to the applicable law in this case.

6. Conclusion of Law No. 2 is contrary to the evidence and the applicable law.

7. Conclusion of Law No. 3 is contrary to the evidence in the case and the applicable law.

326 8. Conclusion of Law No. 4 is contrary to the applicable law of the State of Illinois and the Court should have ruled that the Petitioner was an incompetent witness.

9. Conclusion of Law No. 8 is contrary to the applicable law and the evidence in this case.

10. Said Judgment Order is contrary to the law and the evidence and more particularly, judgment against the Respondent-Appellant in the sum of Twenty Seven Thousand Four Hundred Dollars ($27,400.00) is not justified, in said amount or in any sum of money whatsoever, under the applicable law and evidence.

II.

1. The Court erred as a matter of law in allowing the Petitioner to testify in his own behalf, inasmuch as the Bankrupt was deceased and left him surviving a widow and minor children.

2. The petition of the Petitioner did not state a good and sufficient cause of action upon which to base his claim

and should have been dismissed by the Court.

3. The Petitioner was guilty of laches in not filing his claim until December 1, 1952, more than one year after the occurence in question, thereby hampering and interfering with the orderly administration of the bankrupt estate.

4. The Court erred as a matter of law in allowing Petitioner's claim, where the evidence showed participation by the Petitioner in the activities of the Bankrupt, to such an extent that the Petitioner did not come into court with clean hands, and that Petitioner had ample knowledge of the Turn-Over Order and contempt citation and specifically loaned the Bankrupt money to pay upon said Turn-Over Order, all contrary to equitable principles which govern bankruptcy procedure.

5. The Court erred in permitting the Petitioner to testify as to specific conversations between the Petitioner and the deceased Bankrupt.

6. The Court erred in allowing Petitioner to give opinions and conclusion evidence.

7. The Court erred in allowing Petitioner to testify as to conversations with the deceased Bankrupt, after bankruptcy and after title had passed to certain moneys and personal property, said conversations being in derogation of the Trustee's title.

8. The Court erred in admitting improper evidence.

9. The Court erred in allowing Attorney Robert W. Heinze to testify concerning conversations with the deceased Bankrupt on or about August 1, 1952, and in connection with Petitioner's Exhibit 24.

10. The Court erred in admitting Petitioner's Exhibits
27 and 28, and other exhibits, which were not admissible.

327 11. The Petitioner failed to prove that the Respondent had sufficient moneys on hand to pay said claim, in full or in part.

12. The Petitioner failed to prove by any competent evidence that any moneys given by Petitioner to the Bankrupt were turned over by said Bankrupt to the Respondent; the evidence is totally lacking in any tracing of the funds from Petitioner to the Respondent.

13. The Petitioner failed to prove by any competent evidence that the said Robert L. Knetzer made any representations which were false and which would support a petition for reclamation in this Bankruptcy Court.

WILLIAM C. DUNHAM, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, Respondent-Appellant

/s/ By G. W. Horsley
G. W. Horsley, His Atty.
408 East Adams Street
Springfield, Illinois

PROOF OF SERVICE OF STATEMENT OF POINTS

324 (Filed on May 31, 1955.)

328 STATE OF ILLINOIS }
COUNTY OF SANGAMON } SS.

L. H. LENZ, being first duly sworn, on oath, deposes and says that he is associated in the practice of law with G. W. Horsley, Attorney for William C. Dunham, Respondent-Appellant in the above entitled cause; that on the 31st day of May, A. D. 1955, he caused to be deposited in the United States Mails, with sufficient postage thereon to insure the delivery of same, first class, envelopes addressed to:

Wanless, Craven & Giffin
First National Bank Building
Springfield, Illinois

Roscoe Bonjean
501 Myers Building
Springfield, Illinois

S. S. DuHamel
414 Illinois Building
Springfield, Illinois

ATTORNEYS FOR ROBERT W. JAFFKE,

said envelopes containing each a true and correct copy of Statement of Points filed by Petitioner-Appellee in the above entitled cause.

/s/ L. H. Lenz

SUBSCRIBED AND SWORN to before me this 31st day of May A. D. 1955.

(Seal) /s/ Irma M. Helm
Notary Public

Indorsed
Filed May 31, 1955
G. W. Schwaner, Clerk.

DESIGNATION OF RECORD

329 (Filed on May 31, 1955.)

330 Now comes William C. Dunham, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, a Bankrupt, Appellant herein, by G. W. Horsley, his attorney, and designates the portions of the record and proceedings herein which he deems should be contained in the record on appeal of this cause to the United States Court of Appeals for the Seventh Circuit, as follows:

1. Petition of Robert W. Jaffke filed December 1, 1952.

2. Answer of William C. Dunham as Trustee to said petition, and Affirmative Defenses, filed March 16, 1953.

3. Motion to make more definite first affirmative defense, and reply to other affirmative defenses, filed April 1, 1953.

4. Affidavit for change of venue filed September 24, 1954.

5. Application to disqualify judge, filed September 24, 1954.

6. Transcript of proceedings had and taken before the Honorable Charles G. Briggle on September 24, 1954, filed October 6, 1954.

7. Order of Judge Briggle assigning case to Judge J. Leroy Adair, dated October 8, 1954.

8. Proceedings had and evidence taken in the above entitled cause before the Honorable J. Leroy Adair, United States District Judge, on the 14th and 15th day of October, 1954.

9. All exhibits offered and received in evidence on the part of the Petitioner in this matter, except Petitioner's Exhibits 24, 29 and 30.

10. All exhibits offered and received in evidence on the part of the Respondent William C. Dunham.

11. Findings of fact, conclusions of law and judgment order entered by Judge J. Leroy Adair on April 15, 1955, filed April 18, 1955.

331 12. All other orders and pleadings of record in this matter, having to do only with the petition of Robert W. Jaffke.

13. Notice of appeal filed April 21, 1955.

14. Motion for supersedeas and supersedeas bond, filed April 25, 1955.

15. Order approving supersedeas bond, entered April 25, 1955.

16. Order of Court extending time for filing Designation of Record, Statement of Points and docketing and filing of Record in the United States Court of Appeals for the Seventh Circuit entered May 3, 1955.

17. Statement of points relied upon by William C. Dunham as Trustee on appeal, with proof of service thereon upon counsel for Appellee.

18. All stipulations heretofore or hereafter filed with the Clerk of this Court with regard to this matter.

19. This designation of contents of record on appeal, together with proof of service thereof on counsel for Appellee.

WILLIAM C. DUNHAM, Trustee in Bankruptcy of the Estate of Robert L. Knetzer, a Bankrupt-Respondent-Appellant.

By /s/ G. W. Horsley
G. W. Horsley, His Attorney
408 East Adams Street
Springfield, Illinois

PROOF OF SERVICE
DESIGNATION OF RECORD

329 (Filed on May 31, 1955.)

332 STATE OF ILLINOIS }
COUNTY OF SANGAMON } SS.

L. H. LENZ, being first duly sworn, on oath, deposes and says that he is associated in the practice of law with G. W. Horsley, Attorney for William C. Dunham, Respondent-Appellant in the above entitled cause; that on the 31st day of May A. D., 1955, he caused to be deposited in the United States Mails, with sufficient postage thereon to insure the delivery of same, first class, envelopes addressed to:

Wanless, Craven & Giffin
First National Bank Building
Springfield, Illinois

Roscoe Bonjean
501 Myers Building
Springfield, Illinois

S. S. DuHamel
414 Illinois Building
Springfield, Illinois

ATTORNEYS FOR ROBERT W. JAFFKE,

said envelopes containing each a true and correct copy of Designation of Record filed by Petitioner-Appellee in the above entitled cause.

/s/ L. H. Lenz

SUBSCRIBED AND SWORN to before me this 31st day of May, A.D., 1955.

(Seal) /s/ Irma M. Helm
Notary Public

Indorsed
Filed May 31, 1955
G. W. Schwaner, Clerk.

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD

333 (Filed on June 9, 1955.)

334 Now comes Robert W. Jaffke, Appellee herein, by Roscoe Bonjean and Wanless, Craven and Giffin, his attorneys, and designates the additional portions of the record and proceedings herein to be contained in the record on appeal of this cause to the United States Court of Appeals for the Seventh Circuit, as follows:

1. Exhibits 24, 29 and 30 offered in evidence on the part of the petitioner in this matter.

2. This designation of additional portions of the record and proceedings herein to be contained in the record on appeal of this cause, together with proof of service thereof on counsel for Appellant.

ROBERT W. JAFFKE, Petitioner-Appellee

By: /s/ Roscoe Bonjean
Roscoe Bonjean
501 Myers Building
Springfield, Illinois

/s/ Wanless, Craven & Giffin
Wanless, Craven & Giffin
First National Bank Building
Springfield, Illinois
His Attorneys

Indorsed
Filed June 9, 1955
G. W. Schwaner, Clerk.

PROOF OF SERVICE OF DESIGNATION OF ADDITIONAL PORTIONS OF THE RECRD

333 (Filed on June 9, 1955.)

335 STATE OF ILLINOIS }
COUNTY OF SANGAMON } SS.

ROSCOE BONJEAN, being first duly sworn, on oath deposes and says that he is one of the attorneys of record for Robert W. Jaffke, Petitioner-Appellee in the above entitled cause; that on the 9th day of June, A. D. 1955, he caused to be deposited in the United States Mails, with sufficient postage thereon to insure the delivery of same, first class, envelope addressed to G. W. Horsley, Attorney at Law, 408 East Adams Street, Springfield, Illinois, attorney of record for William C. Dunham, as Trustee of the Estate of Robert L. Knetzer, Bankrupt, Respondent-Appellant, said envelope containing a true and correct copy of Designation of Additional Portions of the Record and proceedings herein to be contained in the record on appeal of this cause to the United States Court of Appeals for the Seventh Circuit.

/s/ Roscoe Bonjean

SUBSCRIBED AND SWORN to before me, a Notary Public, this 9th day of June, A. D., 1955.

(Seal) /s/ Margaret L. Cantrall
Notary Public

Indorsed
Filed June 9, 1955
G. W. Schwaner, Clerk.

CERTIFICATION OF RECORD BY CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JUNE 17, 1955

336 I, G. W. Schwaner, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true

and complete transcript of the proceedings had of record and on file, made in accordance with the Designations of Record in the cause entitled Robert W. Jaffke vs. William C. Dunham, as Trustee of the Estate of Robert L. Knetzer, Bankrupt, in the Matter of Robert L. Knetzer, Bankruptcy No. 11789, as fully as the same appears from the original files and records in said cause now in my office remaining.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 17th day of June, A. D. 1955.

(Seal) /s/ G. W. Schwaner,
Clerk.

Respectfully submitted,

Counsel for Appellant:
G. W. Horsley,
L. H. Lenz,
408 E. Adams Street,
Springfield, Illinois.

Counsel for Appellee:
Roscoe Bonjean,
501 Myers Building,
Springfield, Illinois.

William M. Giffin of
Wanless, Craven & Giffin,
First National Bank Bldg.,
Springfield, Illinois.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 10 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 60

ROBERT W. JAFFKE, *Petitioner,*

v.

WILLIAM C. DUNHAM, Trustee of the Estate of Robert L. Knetzer, Bankrupt, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHAUNCEY P. CARTER, JR.
HERBERT J. MILLER, JR.
World Center Building
Washington 6, D. C.
Attorneys for Petitioner

Of Counsel:
KIRKLAND, FLEMING, GREEN,
MARTIN & ELLIS

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1955

No.

ROBERT W. JAFFKE, *Petitioner,*

v.

WILLIAM C. DUNHAM, Trustee of the Estate of Robert L. Knetzer, Bankrupt, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Robert W. Jaffke, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 13, 1956, as amended February 13, 1956.

OPINION BELOW

The opinion of the Court of Appeals, printed at page 1a of the Appendix hereto, has not as yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1956, and amended February 13, 1956. The jurisdiction of this Court was invoked under 28 U.S.C. section 1254.

QUESTIONS PRESENTED

Where the losing party in the district court (Respondent) appeals to the Court of Appeals, and the prevailing party (Petitioner) took no cross appeal from adverse evidentiary rulings by the district court, did the appellate court err in reversing the judgment and ordering judgment for appellant, holding certain findings unsupported by evidence, refusing to consider, because no cross appeal was taken, evidence supporting such findings adduced by Petitioner but stricken by the trial court?

Where a federal district court, sitting as a bankruptcy court, adjudges a bankrupt in contempt and sentences him to jail for non-compliance with a turn-over order, but the bankrupt is released from imprisonment on numerous occasions over a two year period to locate money to comply with the turn-over order, and the bankrupt fraudulently obtains money from an innocent third party and pays it to the Trustee in Bankruptcy to purchase his freedom, does the Trustee in Bankruptcy as an officer of the court have the duty to investigate the source of such payments?

STATEMENT

This case had its genesis on October 21, 1948, when Robert L. Knetzer was adjudged a bankrupt by the United States District Court for the Southern District of Illinois. (R. 165). He had liabilities of $3,844,000.

(R. 165). Subsequently, William C. Dunham (Respondent here) was appointed Trustee of the Bankrupt's Estate. (R. 76). On July 11, 1949, the district court, sitting in bankruptcy, entered a "turn-over order" directing the Bankrupt, Knetzer to pay over to the Trustee $250,000, which the court found was the amount of assets concealed by the Bankrupt (R. 144). On December 1, 1949, the Bankrupt was found guilty of contempt of court for failing to comply with the "turn-over order" and remanded to jail on March 28, 1950. (R. 165). He was released from confinement, however, on numerous occasions during the period December 1, 1949 to February 13, 1952 upon his undertaking to locate assets sufficient to comply with the "turn-over order" and purge himself of contempt. (R. 85, 166). In fact his freedom on several occasions was requested by Respondent. (R. 85). The Bankrupt after these excursions from custody would make payments to Respondent, in effect buying further freedom from imprisonment. (R. 77-82). Respondent made no inquiry respecting the source of the payments (R. 87).

Several times when the Bankrupt was out of jail he contacted Petitioner (Plaintiff below) which contacts resulted in payments by Petitioner to the Bankrupt in the sum of $47,980 during a period from December 7, 1950 to October 23, 1951. As the district court found, which finding was affirmed on appeal, the Bankrupt had defrauded Petitioner of these sums. (R. 166).

Upon discovering the fraud of Bankrupt, Petitioner filed a reclamation petition against the Bankrupt and the Trustee in Bankruptcy (Respondent), seeking a return of the monies fraudulently extracted from him (R. 3). Prior to the summary proceeding in the dis-

trict court on Petitioner's reclamation petition the Bankrupt died, and the petition was successfully prosecuted against the Respondent, resulting in a verdict in favor of Petitioner in the amount of $27,400. (R. 167). It was the finding of the lower court that the Bankrupt had defrauded Petitioner of $27,400, which money had been turned over to Respondent in purported compliance with the "turn-over order." (R. 166-167).

Additionally, the trial court made certain rulings on evidence tendered by Petitioner and struck from the record certain of such evidence, including a statement by the Bankrupt, in affidavit form, that he had turned over to the Trustee (Respondent) $36,000 which he had obtained from Petitioner. (R. 167).

Respondent appealed to the United States Court of Appeals for the Seventh Circuit, contending that there was no substantial evidence to sustain the findings of the district court that the money which the Bankrupt had defrauded from Petitioner had, in fact, been paid over to Respondent, Trustee. The appellate court sustained this contention. The court, however, expressly refused in weighing the evidence to consider the ruling of the trial court striking the statement of the Bankrupt under oath that he had in fact paid $36,000 of the monies defrauded from Petitioner to Respondent. As basis for this refusal, the court stated:

> "There was no cross-appeal by the petitioner to question this action by the trial court, and this court may not consider Knetzer's affidavit as evidence in this case."

The court of appeals reversed and remanded the case for further proceedings before the trial court, but upon a petition by Respondent modified the judgment to re-

quire the district court to enter judgment for Respondent.

REASONS FOR GRANTING THE WRIT

A. The Nature of Cross-Appeals

This Court should grant this Petition not only because of the impact of the decision below on appellate practice, but also because the decision is in conflict not only with decisions of other circuits but also of this Court.

The effect of the decision sought to be reviewed upon orderly appellate procedures may not be minimized. The court of appeals has established a rule that when the losing party in the district court appeals the winning party in the district court, at penalty of waiver, is required to cross appeal all rulings of the trial court with which he takes issue including rulings on evidence. This is contrary to established law that only a party aggrieved may appeal. Placing this burden on the prevailing party will, if carried to the only logical conclusion, change appellate review into proceedings more in the nature of appellate trials *de novo*.

For, complying with the appellate decision in this case, careful practitioners who represent the prevailing litigant will cross appeal every trial court decision where, during the trial, adverse rulings have been made. The effect is patent. The record on appeal will be more voluminous—a necessity where both the successful and unsuccessful litigants must present the arguments important to their respective cases. Appellate briefs must be expanded to accommodate arguments on *all* the rulings of the trial court, not just those which aggrieve the losing party. Thus, instead of a desirable focusing of issues in the appellate court,

there is accumulated a mass of issues, many of which, in cases of affirmance, are irrelevant.

The refusal of the appellate court to review the evidentiary rulings adverse to the prevailing party is in conflict with decisions of this and circuit courts. Petitioner was victorious in the district court. The findings of fact* of the district court as was the decree, were favorable to Petitioner. Other circuit courts of appeal as well as this Court have held, contrary to the decision here sought to be reviewed, that Petitioner in these circumstances is barred from taking any appeal or cross appeal from the decision of the district court. *Harding* v. *Federal National Bank*, 31 F. 2d 914 (1st Cir. 1929); *In re Schwartz*, 89 F. 2d 172 (2nd Cir. 1937); *Lanova Corp.* v. *National Supply Co.*, 116 F. 2d 235 (3rd Cir. 1940); *United Engineering and Foundry Co.* v. *Gold Metal Process Co.*, 68 F. 2d 564 (3rd Cir. 1934), *cert.* den. 291 U.S. 675); *Aberly* v. *Craven County*, 70 F. 2d 52 (4th Cir. 1934); *Ottenheimer Bros.* v. *Libuwitz*, 74 F. 2d 858 (4th Cir., 1935), *cert.* den. 296 U.S. 582; *Mach* v. *Abbott Co.*, 136 F. 2d 7 (8th Cir., 1943), *cert.* den. 320 U.S. 773; *United States* v. *Adamant Co.*, 197 F. 2d 1 (9th Cir., 1952), *cert.* den. 344 U.S. 903 (1952); *Corning* v. *Troy Iron & Nail Factory*, 56 U.S. 451, 14 L. Ed. 768 (1853); *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151 (1934); *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1938). Indeed the court of appeals for the Seventh Circuit had earlier so held. *Commissioner of Internal Revenue* v. *Kelly's Estate*, 84 F. 2d 958 (7th Cir., 1936), *cert.* den. 299 U.S. 603.

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* Cf. *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89 (1954).

While Petitioner had no standing to cross appeal, he had the right to urge in the court of appeals any matter in support of the trial court's judgment which he had relied on at the trial, including matter overlooked or ignored by the trial court. *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924); *Langnes* v. *Green*, 282 U.S. 531 (1931); *Anderson* v. *Atherton*, 302 U.S. 643 (1937); *Morley Constr. Co.* v. *Maryland C. Co.*, 300 U.S. 185 (1937); *Standard Accident Insurance Co.* v. *Roberts*, 132 F. 2d 794 (8th Cir., 1942). The appellate court may affirm a judgment of the district court even though based on grounds rejected by the lower court. *Lanova Corp.* v. *National Supply Co., supra; Century Distilling Co.* v. *Continental Distilling Co.*, 106 F. 2d 486 (3rd Cir., 1939). Since Respondent saw fit to appeal from the entire judgment the entire case was open in the court of appeals and the evidentiary rulings of the lower court could have been considered in the absence of a cross appeal. *Commercial National Bank in Shreveport* v. *Parsons*, 144 F. 2d 231 (5th Cir. 1944), *cert.* den. 323 U.S. 796 (1945).

Thus the court of appeals had the duty of considering the district court's ruling striking an admission by the Bankrupt that he had turned portions of money defrauded from Petitioner over to Respondent, even though Petitioner, the prevailing party below, had failed to, indeed could not, file a cross appeal. The appellate court has thus denied Petitioner his day in court and permits the Respondent to retain money fraudulently extracted from Petitioner which Bankrupt admitted he had delivered to Respondent to purchase his freedom.

The decision of the court below is in conflict with the above authorities, a conflict which should be resolved.

B. A Trustee's Duty Under a Turn-Over Order

This Court has reviewed the duty of trustees in bankruptcy under turn-over orders in relation to the bankrupt. *Maggio* v. *Zeitz*, 333 U.S. 56 (1948). Now presented is the duty of the Trustee to innocent third parties under such an order.

A turn-over order is a harsh remedy. Addressed to a debtor it means "pay up or go to jail." This is as drastic a coercive remedy as a bankruptcy court can invoke. And common knowledge tells us that a threat of imprisonment may cause a man to contravene moral or legal duties. The protection of innocent third parties requires that some duty be imposed on trustees in bankruptcy to examine title to assets received by them under the aegis of a turn-over order.

Because the power to issue a turn-over order is not statutory with defined limitations and because of its increasing use, the question here involved is of utmost importance in the administration of the Federal Bankruptcy Laws and should be reviewed by this Court.

The Bankrupt, Knetzer, was adjudged in contempt of court in July of 1949 for failure to turn over concealed assets to Respondent Trustee in Bankruptcy. It must be assumed that if he had sufficient assets to comply with the order, compliance would have been forthcoming. Instead, however, by means of the turn-over order, the Bankrupt was forced to purchase his freedom by bargaining for release from jail in return for delivering sums of money to the Trustee in Bankruptcy. In effect, the turn-over order was a form of judicial duress, forcing the Bankrupt to supply the Trustee with money if he wished to be a free man. That this duress led the Bankrupt to defraud innocent third

parties for funds necessary to obtain his freedom is not surprising. Because of the unusual nature of the turn-over order, and because of its compulsion on Bankrupt, there was a duty upon the Trustee in Bankruptcy to ascertain the source of the monies paid over to him by the Bankrupt.

The Trustee acquires no title to property acquired by the Bankrupt after his adjudication as such. 11 U.S.C. § 110. Nor is the Trustee an innocent purchaser. *Zartman* v. *First Nat. Bank*, 216 U.S. 134 (1910). Consequently the monies obtained from Petitioner, being after-acquired property, never vested in the Trustee. This fact, plus the coercion of the Bankrupt must compel the Trustee to ascertain the source of funds received. That a man will do more than commit fraud to avoid incarceration needs no citation. Turn-over orders must not be utilized to force a Bankrupt to perform criminal acts to the detriment of innocent third parties. Cf. *Maggio* v. *Zeitz*, 333 U.S. 56 (1948). In view of the Trustee's failure to comply with the duty upon him to ascertain the source of the monies paid him by the Bankrupt, Petitioner here, the defrauded third party, need not trace the funds into the Trustee's hands, but on the contrary, the burden must be placed upon the Trustee to demonstrate that he had reasonable cause to believe that the money handed him by the Bankrupt was in fact a portion of the concealed assets. The absence of even a token compliance with this duty is demonstrated. Particularly is this true where the money was received by the Trustee over a year subsequent to the entry of the turn-over order. Additionally the Trustee had notice from the Bankrupt's prior activities that he was not to be trusted. Cf. *Watchmaker* v. *Barnes*, 259 Fed. 783 (1st Cir. 1919). The

Trustee made no inquiry as to the source of the funds. His was the burden of making inquiry. 2 Scott on Trusts §§ 297, 476. If a reasonable inquiry would have disclosed the source and the fraud, he may not retain the funds obtained. If not, Petitioner would have to trace the funds into the hands of the Trustee.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for *certiorari* should be granted.

Respectfully submitted,

CHAUNCEY P. CARTER, JR.
HERBERT J. MILLER, JR.
Attorneys for Petitioner

Of Counsel:
KIRKLAND, FLEMING, GREEN,
MARTIN & ELLIS

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11508. JANUARY SESSION, 1956, OCTOBER TERM, 1955.

In the Matter of
ROBERT L. KNETZER, Bankrupt.

ROBERT W. JAFFKE,
Petitioner-Appellee,

v.

WILLIAM C. DUNHAM, as Trustee of the Estate of ROBERT L. KNETZER, Bankrupt,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

January 13, 1956.

Before DUFFY, *Chief Judge*, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* This is an appeal from an order of the United States District Court for the Southern District of Illinois, Southern Division, sitting in Bankruptcy in the Matter of Robert L. Knetzer, Bankrupt. The order appealed from required the trustee of the bankrupt estate to pay from the funds in his possession to the petitioner, Robert W. Jaffke, the sum of $27,400.00 which the court found that the bankrupt, Robert L. Knetzer, had procured from Jaffke by fraud subsequent to October 21, 1948, the date on which Knetzer had been adjudged a bankrupt.

The fraud by which Knetzer was alleged to have induced the petitioner to give him the money which petitioner seeks

to reclaim from the trustee in bankruptcy consisted of representations by Knetzer to the petitioner made during the period from December 7, 1950, to and including March of 1951. These representations were that he (Knetzer) was the manager of a large corporation known as the Bison Construction and Mining Corporation in which a number of well to do men were interested; that this corporation was to build a large number of homes in a housing project near the Air Force Base at Great Falls, Montana; that a similar project which Knetzer had just finished promised to pay a 50 per cent profit; that an influential man was arranging for a loan to the corporation from the Reconstruction Finance Corporation, but that it was such a large scale operation that it would take two years to complete it and that in order to initiate the business the corporation needed money then; and that the investors in this project would share pro rata in the profits.

Jaffke's petition alleges that these representations by Knetzer were false and were known to Knetzer to be false but that they were believed by Jaffke to be true, and that by these false representations Knetzer induced Jaffke to give him for investment in the project money in the total sum of $47,980.00.

In the hearing on Jaffke's petition, Jaffke testified that because of Knetzer's false representations he (Jaffke) paid to Knetzer during the period between December 7, 1950 and October 22, 1951, both dates inclusive, a total of $47,980.00. Jaffke's petition alleged that of this amount Knetzer turned over to the defendant trustee the sum of $36,000.00.

In arriving at the amount of $27,400.00, which the trial court ordered that the petitioner recover from the trustee, the court apparently substracted from the amount alleged to have been paid to the trustee by Knetzer, $3,800.00 which Jaffke admitted that he knew was to be paid to the trustee to keep Knetzer out of prison, and $4,800.00 which Jaffke admitted had been repaid to him by a relative of the bankrupt.

In seeking to set aside the order of the trial court the appellant trustee questions the admission of certain evidence which was received in the hearing on Jaffke's petition. The appellant first questions the competence of the

testimony of the petitioner as to his dealings with Knetzer. The objection to this testimony is based on Section 2 of the Evidence Act of the State of Illinois, Illinois Revised Statutes, c. 51 § 2 (Bar Association Edition 1955). This statute provides in part:

> "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any habitual drunkard, or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee * * *."

The testimony of the petitioner was objected to on the ground that he was an "interested party" within the meaning of the statute for the reason that the respondent trustee was acting not only as trustee in bankruptcy for the creditors but also as trustee and representative for the widow and minor children who were heirs of the deceased bankrupt. The bankrupt, Knetzer, died prior to the hearing on the petition and left a widow and children.

We think this objection was not well taken. The obvious purpose of the Illinois statute is to protect persons under disability and the heirs of deceased persons, and Knetzer's heirs did not stand to gain anything out of the bankruptcy estate. During the period of time in which the false representations were made the bankrupt, Knetzer, was engaged in attempts to comply with a court order to turn over to the trustee the sum of $250,000.00, which represented the amount of assets which the court had found that Knetzer owned and had concealed. On Knetzer's failure to comply with the turn over order he was found to be in contempt of court and was sent to jail. The court permitted Knetzer to leave the jail on different occasions in the custody of the United States Marshal or of bailiffs of the court. This permission was granted on Knetzer's promises that he could and would use his freedom to procure the required $250,000.00 and thereby purge himself of contempt. During the period from December 7, 1950 to November 16, 1951,

Knetzer procured and turned over to the trustee a total amount of only $79,923.72.

On January 27, 1950, the trustee wrote a letter to Knetzer's creditors explaining that Knetzer was hopelessly insolvent; that all of his assets had been sold and turned into cash; that the trustee then had on hand a total of $74,000.00; and that claims in the total amount of $3,844,776.54 had been filed in the Knetzer bankruptcy matter.

From these undisputed facts it seems certain that Knetzer's only interest in his bankruptcy matter while he was alive was to try to get out or stay out of jail. It was certain that the trustee at the close of the bankruptcy proceeding could have nothing left to turn back to Knetzer. It follows that after Knetzer's death there could be nothing left to turn over to Knetzer's heirs. The contest here over the funds in the trustee's hands could only affect the petitioner and the other creditors. Under these circumstances we think the trial court did not err in admitting Jaffke's testimony as to his transactions with Knetzer.

The trustee points out that the petitioner filed this action against both Knetzer and the trustee; but the record shows that after the death of Knetzer, his death was suggested to the court and the action then proceeded against the trustee alone, pursuant to Rule 25 of the Federal Rules of Civil Procedure.

After carefully reviewing all of the evidence in this case it seems clear that there was a sufficient basis for the trial court's finding that Jaffke did pay to Knetzer the total sum of $47,980.00 because the petitioner believed the false statements that Knetzer made to him concerning the fictitious construction and mining corporation and the likelihood of large returns for those investing in it. But petitioner's proof that he had been so defrauded by Knetzer was not enough to establish the preference he sought over the other creditors. Most of the claimants in this bankruptcy matter had also been defrauded by Knetzer's representations that he would sell and deliver to them automobiles and tractors which Knetzer knew he could not deliver. But by these representations Knetzer induced them to make large deposits on the purchase price of automobiles and tractors which they ordered. Jaffke himself had been so defrauded by Knetzer to the extent of $11,300.00, for

which Jaffke's attorneys filed for him a general claim with the trustee in bankruptcy.

But in the instant proceeding Jaffke claims that since Knetzer, after he had been adjudged a bankrupt, procured the amount of $47,980.00 from him by fraud and then paid $36,000.00 of that amount to the trustee, the money so paid did not become the property of the trustee because it was impressed with a trust in favor of the petitioner. Thus, argues the petitioner, he is entitled to recover the amount of $36,000.00 from the assets in the hands of the trustee.

To support his claim on this theory it was just as necessary for the petitioner to prove that the $36,000.00 was paid to and became a part of the funds in the hands of the trustee as it was to prove that Knetzer had procured this money by fraud. This we think the petitioner has failed to do. It is true that Knetzer in August 1952, while in jail, executed an affidavit stating that of the money he received from Jaffke he paid $36,000.00 to the trustee. This affidavit was tentatively received in evidence over the objection of counsel for the trustee but at the conclusion of the hearing the trial judge sustained the objection and the trustee's motion to strike Knetzer's affidavit from the record. There was no cross-appeal by the petitioner to question this action by the trial court, and this court may not consider Knetzer's affidavit as evidence in this case.

At the top of page 19 of petitioner's brief in this court we find the following statement:

> "Plaintiff's Exhibit No. 29 offered in evidence is a record of a prior proceeding, pursuant to an adjourned creditor's meeting, in this bankruptcy cause wherein Knetzer admitted under oath in open court that since his bankruptcy he obtained more than Forty Thousand Dollars ($40,000.00) from plaintiff; and from which sum, payment had been made to William C. Dunham, his trustee under the turnover order (Tr. 160; original record 291-301)."

The original record to which we are thus cited does show that Knetzer testified that he had received from Jaffke more than $40,000.00 but it does not show what part, if any, of that amount was paid to the trustee. Even if the

record had shown that Knetzer testified in that former hearing as petitioner claims, his testimony could not be considered as evidence in this matter because the trial court also granted the motion of counsel for the trustee to strike from the evidence the entire record of that former hearing.

Without the affidavit of Knetzer we find no sufficient evidentiary basis for the finding of the trial court that $36,000.00 of the money which Jaffke paid to Knetzer was delivered by Knetzer to the trustee. The order of the trial judge to turn over his concealed assets in the amount of $250,000.00 was served on Knetzer July 11, 1949. On November 1, 1949, the trustee reported that Knetzer had not complied. Knetzer was then ordered to appear on November 15, 1949, and show cause why he should not be adjudged in contempt. On December 1, 1949, Knetzer was held to be in contempt and ordered committed to jail until he had obeyed the turn over order, but execution of this order was stayed until January 11, 1950.

The evidence and stipulations of the parties indicate that others than Jaffke had been defrauded by Knetzer on the same story that Knetzer had told to Jaffke. These other persons included Riley, Petty and Sammons. Prior to any payments to Knetzer by Jaffke, Riley paid Knetzer, between June 28, 1950 and September 15, 1950, the total sum of $32,389.00. Between April 14, 1951 and July 1951, Petty paid Knetzer $44,000.00; and between October 1, 1951 and February 1, 1952, Sammons paid Knetzer $101,550.00. Jaffke's payments to Knetzer amounted to $47,980.00 and were made between December 7, 1950 and October 22, 1951. The total amount thus paid to Knetzer by these four men was $225,919.00. Of this amount Knetzer paid to the trustee during the period here in question only $79,923.00. It is evident, therefore, that $145,996.00 of the amount Knetzer received from these four men was not paid over to the trustee.

During the month of December 1950 Knetzer made payments to the trustee in the total amount of $11,500.00. This amount might have been paid from the $250,000.00 in assets which the court found that Knetzer owned and had concealed, from the funds Riley had paid to Knetzer, or from the money Jaffke had paid to Knetzer. Although Knetzer

was being pressed for payments on the turn over order he paid nothing further to the trustee during the months of January, February and March of 1951. During the months of April, May and June of 1951 Knetzer, or some one in his behalf, paid to the trustee $55,923.72. During that period Knetzer, in addition to the funds he had received from Riley and Jaffke, also received from Petty $44,000.00 which Knetzer may have paid to the trustee as part of the total paid to the trustee during that period. The last six payments of $1,000.00 each made by Knetzer to the trustee may have been from the $101,550.00 which Sammons paid to Knetzer between October 1, 1951 and February 1, 1952, or they may have been from the payments made by any one of the other three men from whom Knetzer had fraudulently procured funds.

A finding of fact by a trial court may not be based on a guess of what might have happened. It can only be grounded on evidence which supports a reasonable inference as to what did happen. We find no evidence remaining in this record after the Knetzer affidavit was excluded to justify an inference that $36,000.00 of Jaffke's money was paid over to the trustee.

The judgment is REVERSED and the cause remanded ~~for further proceedings consistent with the views expressed in this opinion.~~ with instructions to enter Judgment for the Respondent-Appellant.

SCHNACKENBERG, *Circuit Judge*, concurring. I concur in the foregoing opinion, with the exception that I believe the judgment should be reversed and there is no need for a remandment. ~~Upon the hearing in the district court both parties had an opportunity to, and did, offer evidence which they considered relevant to all issues presented there and later in this court. There is no occasion now for a further hearing. Both sides have had their day in court.~~

(Per Order of February 13, 1956)

A true Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Friday, January 13, 1956

Before

Hon. F. RYAN DUFFY, *Chief Judge*
Hon. H. NATHAN SWAIM, *Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 11508

In the Matter of
ROBERT L. KNETZER, Bankrupt.

ROBERT W. JAFFKE,
Petitioner-Appellee,
v.
WILLIAM C. DUNHAM, as Trustee of the Estate of ROBERT L. KNETZER, Bankrupt,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and the same is hereby REMANDED to the said District Court ~~for further proceedings consistent with the views expressed in the Opinion of this Court filed this day.~~ with instructions to enter Judgment for the Respondent-Appellant.

(as amended per Order of February 13, 1956)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Monday, February 13, 1956

Before

Hon. F. RYAN DUFFY, *Chief Judge*
Hon. H. NATHAN SWAIM, *Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 11508

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v.
WILLIAM C. DUNHAM, as Trustee of the Estate of ROBERT L. KNETZER, Bankrupt,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

On consideration of the respondent-appellant's motion to modify the judgment in this cause and alternative motion for a clarification of the opinion and judgment, and of the petitioner-appellee's answer thereto,

It is ordered by the Court that the last paragraph of the majority opinion in this cause, filed January 13, 1956, be modified as follows:

The judgment of the District Court is reversed, and the cause is remanded with instructions to enter judgment for respondent-appellant.

SCHNACKENBERG, *Circuit Judge*, concurring. I now modify my previous concurring opinion by striking all of it except the first sentence.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 60

ROBERT W. JAFFKE, *Petitioner*

v.

WILLIAM C. DUNHAM, Trustee of the Estate of ROBERT L. KNETZER, Bankrupt, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 229 F. 2d 232. The decision of the district court is not officially reported but is set forth at R. 164-167.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1956. The judgment was modified by the Court of Appeals on February 13, 1956. The petition for a writ of certiorari was filed on April 11, 1956, and was granted on May 28, 1956 (R. 202). This Court has jurisdiction under 11 U.S.C. § 47 and 28 U.S.C. § 1254.

QUESTIONS PRESENTED

Where the losing party in the district court (Respondent) appeals to the Court of Appeals, and the prevailing party (Petitioner) took no cross appeal from adverse evidentiary rulings by the district court, did the appellate court err in reversing the judgment and ordering judgment for appellant, holding certain findings unsupported by evidence, refusing to consider in the absence of a cross appeal evidence supporting such findings adduced by Petitioner but stricken by the trial court?

Where a federal district court, sitting as a bankruptcy court, adjudges a bankrupt in contempt and sentences him to jail for non-compliance with a turnover order, but the bankrupt is released from imprisonment on numerous occasions over a two year period to locate money to comply with the turnover order, and the bankrupt fraudulently obtains money from an innocent third party and pays it to the Trustee in Bankruptcy to purchase his freedom, does the Trustee in Bankruptcy as an officer of the court have the duty to investigate the source of such payments?

STATEMENT

On October 21, 1948, Robert L. Knetzer was adjudged bankrupt by the United States District Court for the Southern District of Illinois (R. 165). On December 3, 1948, William C. Dunham, Respondent here, was appointed Trustee in Bankruptcy of the Knetzer Motor Sales Company. On December 10, 1948, he was appointed Trustee in Bankruptcy of the Robert L. Knetzer Estate (R. 76).

The Bankrupt's Estate was hopelessly insolvent (R. 182). Knetzer Motor Sales Company was in an equally hopeless position (Def. Exh. 1, R. 161-164, 138). Before his bankruptcy, the Bankrupt had persuaded many persons to make large deposits on automobiles and tractors which were never delivered (R. 182).*

The Turnover Order

On July 11, 1949, approximately nine months after the bankruptcy, the District Court found that the Bankrupt, Knetzer, had concealed assets of his Estate and entered a turnover order requiring him to pay Respondent "forthwith" $250,000. The order specifically recited that hearing had been held in both the Estates of Robert L. Knetzer and Knetzer Motor Sales Company, Bankrupts; that Respondent as Trustee for Knetzer Motor Sales Company was *not* entitled to any turnover order against Knetzer; and that monies recovered were to be held by Respondent as Trustee for the Estate of Robert L. Knetzer (Pet. Exh. 1, R. 137, 144).

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* R. W. Jaffke, Petitioner, was one of those who made such a deposit. Upon Knetzer's bankruptcy he filed a claim as a general creditor (R. 44, 47). This claim is not involved in this case.

On December 1, 1949, the Bankrupt, upon Respondent's petition to show cause, was found guilty of contempt of court for failure to comply with the turnover order (Pet. Exhs. 2, 3, 4, R. 137, 145-148). The sentence to jail for contempt was stayed, however, until February 18, 1950 (Pet. Exh. 4, R. 137, 149). On March 28, 1950, the Bankrupt was sent to jail.

He was permitted to leave jail on different occasions in the custody of a United States Marshall upon promising that he would use his freedom to obtain sufficient assets to comply with the turnover order (R. 181). On "many occasions" when the Bankrupt was out of jail he approached Respondent and promised to make payments on the turnover order at some definite time in the future. Respondent would then call his attorney or the district judge to obtain permission for the Bankrupt to remain out of jail (R. 85). Respondent, of course, knew that the Bankrupt had been jailed and had "been in and was out and back in again." (R. 85). The Bankrupt while on these excursions from jail made installment payments to Respondent on the turnover order, in effect buying further freedom from imprisonment (R. 77-82). This continued until February, 1952.

Payments on the turnover order were also made by third persons.

Fraud on Petitioner

On December 6, 1950, over a year after the Bankrupt had been adjudged in contempt, Petitioner was contacted by the Bankrupt (R. 49-51). He told Petitioner of the Bison Mining and Development Company which was to build a large scale housing development (R. 49-50). Knetzer convinced Petitioner that

there were large profits to be made, and based upon representations found by the trial and appellate courts to be fraudulent, Petitioner gave him $2300 (R. 50-51, 53). Later the same day Petitioner gave him an additional $3800 upon the representation by the Bankrupt that he needed the additional money to pay into Court on his Bankruptcy account. The Bankrupt stated that he had agreed to make the payment to the court under duress (R. 53-54). He told Petitioner that $3,800 payment to the court would give him sufficient time to complete the Bison Company "deal." (R. 54) At the time of the two meetings the Bankrupt was not in the custody of any third person or a United States Marshall (R. 51).

Petitioner saw or heard from Knetzer from time to time during the ensuing period and at no time was he ever in custody (R. 57). Petitioner made further payments to the Bankrupt totalling $47,980.00. These payments were further investments in the Bison Company. The last payment was made on October 22, 1951* (R. 109). The trial court found, which finding was affirmed on appeal, that during the period December 7, 1950 to October 23, 1951, the Bankrupt defrauded Petitioner of the sum of $47,980.00 (R. 109).

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* To summarize, Petitioner made the following payments to the Bankrupt on the dates indicated:

12- 7-50	$ 6,100.00	1- 8-51	$ 1,000.00
12-13-50	12,500.00	3-14-51	520.00
12-18-50	7,500.00	6-21-51	260.00
12-22-50	9,000.00	9- 1-51	360.00
1- 3-51	6,000.00	10-21-51	2,000.00
		10-22-51	2,800.00
		Total	$47,980.00

The Bankrupt's Admission

Petitioner learned for the first time in the spring of 1952 that the Bankrupt had not used the money for the Bison Mining and Development Company. He discovered that the Bankrupt had instead paid Thirty-six Thousand Dollars ($36,000.00) of the $47,980.00 to Respondent (R. 110-112). Based on information from the Bankrupt, Petitioner prepared an affidavit for the Bankrupt's signature (Pet. Exh. 24, R. 203, 112). This affidavit was presented to the Bankrupt by the Bankrupt's attorney, R. W. Heinze, who warned the Bankrupt that he could not sign it if it were not true (R. 103-104). The Bankrupt signed the affidavit before a notary after being sworn (R. 105, 74-76). The affidavit contains an admission by the Bankrupt that he obtained $47,980.00 from Petitioner from December 7, 1950 to October 23, 1951, and that he paid $36,000.00 of that sum to Respondent as Trustee "for the purposes of remaining out of jail." (R. 203).

Petitioner's Suit

On December 1, 1952, Petitioner filed his petition to recover $47,980.00 from the Bankrupt and $36,000.00 from Respondent. On August 26, 1953, the Bankrupt Knetzer died (R. 35).

At the trial, Respondent, called as an adverse party by plaintiff, testified as follows. During the period from December 7, 1950 to November 1, 1951, he received installment payments on the turnover order totalling $75,923.72 from the Bankrupt and one Saul Cohn (Tr. 87). Respondent knew Cohn was an attorney but he did not know whom Cohn was representing nor did Respondent know where Cohn obtained the money (R. 79-80). Respondent never made any

inquiry of Knetzer as to where he obtained the money paid in under the turnover order (R. 87). Respondent never had any evidence that the payments made under the turnover order were from concealed assets of the Estate (R. 93-94).

Respondent knew that the Bankrupt was out of jail on many occasions *not* in the custody of a Marshall (R. 77). There is no evidence that Respondent inquired why the Bankrupt was not in custody when free of confinement. Respondent, at the Bankrupt's suggestion, would request the court to grant the Bankrupt additional time out of jail (R. 85).

Respondent requested this additional freedom even though he had heard testimony under oath that the Bankrupt had been obtaining money from third parties. This testimony was given at creditors' meetings as early as April 13, 1950 (R. 84, 90-91, 38-39). Additionally, third persons made payments to Respondent purportedly under the turnover order (R. 80, 82, 83, 84).

The Bankrupt gave the Respondent many different reasons why he could not pay the entire amount required by the turnover order (R. 87). He told the Respondent of many "business ventures" (R. 86), including the "Christmas tree" and "Teapot Dome deals" (R. 83, 86). Respondent, with knowledge of the above facts, failed to make any inquiry as to the source of money paid to him (R. 80, 78-79, 87). Respondent had no evidence that money paid in was from concealed assets (R. 93-94). Respondent remembered his testimony at a grand jury hearing in 1952 "very well" (R. 88). Yet Respondent *could not deny* that he may have testified at the hearing that he had received

in excess of $5,000.00 from the Bankrupt in 1951, which the Bankrupt told him had been obtained from Petitioner (R. 88-89).

Ralph Riley, another investor, testified that he had paid the Bankrupt $32,389.00 between June 28, 1950 and September 12, 1950 (R. 140). Petitioner in his brief to the trial court requested the court to take judicial notice that Respondent had received payments under the turnover order of $32,076.28 in the period June 28, 1950 to October 28, 1950 (R. 193). Petitioner testified that the Bankrupt obtained $47,980.00 from him during the subsequent period, December 7, 1950 through October, 1951.

Another witness, Clint Petty, testified he paid the Bankrupt $44,000.00 from April 14, 1951 through May, 1951 (R. 138-139). Respondent received $75,923.72 under this turnover order during the period December 7, 1950 through October, 1951 (R. 87). Subtracting the entire $44,000.00 Petty paid the Bankrupt from the total received by Respondent during the above period leaves a balance of $31,923.72.

It was stipulated at trial that one Sammons, if present, would testify that he paid the Bankrupt $101,550.00 during the period *November* 1, 1951 to February, 1952 (R. 138).*

The Decision of the Trial Court

The trial court, at the conclusion of the trial and after receiving briefs from the parties, found that the Bankrupt during the period December 6, 1950 to November 1, 1951, had obtained large sums of money

* The court of appeals erroneously stated the stipulation covered a period from *October* 1, 1951 (R. 185).

from Petitioner by fraud and misrepresentation. The court further found that $27,400 of the money so obtained from Petitioner was delivered over to Respondent as Trustee in Bankruptcy* who had possession of $27,400 that belonged to Petitioner. The court concluded that the equities of the case were with Petitioner. The court entered judgment for Petitioner for $27,400. The court, however, sustained Respondent's motion to strike Petitioner's Exhibit 24, the affidavit of the Bankrupt.** (R. 164-167). The findings and judgment of the trial court are found at R. 164-167.

The Decision of the Court of Appeals

Respondent appealed and the court of appeals reversed (R. 179-186). The court of appeals sustained the finding of the lower court that the Bankrupt had defrauded Petitioner of $47,980. The court ruled, however, that the evidence in the record was not sufficient to support a finding that the Bankrupt had paid $27,400 of this money to Respondent. The court refused to pass on whether the trial court had properly stricken the affidavit of the Bankrupt Knetzer, stating

> "There was no cross-appeal by the petitioner to question this action by the trial court, and this court may not consider Knetzer's affidavit as evidence in this case" (R. 183).

The court then declared that without the affidavit of Knetzer there was no sufficient evidentiary basis to

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* Significantly the judge stated at the conclusion of the trial: "I don't think the Court can be very much confused about the facts of the money paid in" (R. 143).

** The Honorable J. Leroy Adair who presided at the trial died January 19, 1956.

support the finding of the trial court that the Bankrupt had paid $27,400 of Petitioner's money to Respondent. The judgment of the trial court was reversed and the cause remanded for further proceedings.

On Respondent's motion to modify the mandate (R. 187), however, the appellate decision was modified to provide that the cause be remanded "with instructions to enter judgment for the respondent-appellant" (R. 186).

SUMMARY OF ARGUMENT

I

A. Where an appeal is taken by the losing party from a judgment of the district court, the victorious party may support the judgment on appeal on any ground raised below. *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425 (1924); *Anderson* v. *Atherton*, 302 U.S. 643 (1937); *Langnes* v. *Green*, 282 U.S. 531 (1931). He may urge affirmance of the judgment on grounds not considered, or which were overlooked by the trial court. *Ibid.*, *Morley Construction Co.* v. *Maryland C. Co.*, 300 U.S. 185 (1937). Petitioner, seeking to support the findings and judgment favorable to him, had the right to urge that evidence improperly stricken at the trial be considered in support of the judgment. *Yoder* v. *Nu-Enamel Corp.*, 145 F. 2d 420 (8th Cir. 1944). A cross-appeal was not a condition precedent to this right. *Anderson* v. *Atherton, supra.* The contrary holding of the court below is erroneous.

B. A party litigant does not have an appealable interest unless aggrieved by the judgment of the trial court. *Corning* v. *Troy Iron & Nail Factory*, 56 U.S. 451 (1853); *Public Serv. Com.* v. *Brashear Freight*

Lines, 306 U.S. 204 (1939). Petitioner had a judgment of $27,400 in the district court. Petitioner was aggrieved only by the rulings of the trial court which barred him from recovering the entire amount sought in his *ad damnum,* $36,000. Such rulings may be challenged by appeal or cross-appeals—other rulings may not. The trial court found that money defrauded from Petitioner had been paid to Respondent. Its ruling striking evidence supporting that fact did not affect the *amount* of Petitioner's recovery. Petitioner not being aggrieved, could not appeal this ruling. It was error for the court of appeals to refuse to pass on such evidentiary rulings adverse to Petitioner and to order judgment for Respondent because Petitioner had not filed a cross-appeal.

II

A. The affidavit which was stricken by the trial court is admissible as a declaration against interest.

In the affidavit the Bankrupt who died before trial (R. 35) admitted having obtained $47,980 from Petitioner. He further admitted converting $36,000 of that money to an unauthorized use, *i.e.,* paying it to Respondent. This admission would also deprive the Bankrupt of credit for money paid in under the turnover order. Both statements were against the pecuniary interest of the Bankrupt.

Federal Rule of Civil Procedure 43 declares that where more than one rule of evidence may apply, the one favoring admissibility should govern. Under the law of Illinois, the situs of the district court, as under the law of evidence generally, the affidavit was admissible as a declaration against interest. *Schell* v. *Weaver,* 225 Ill. 159, 80 N.E. 95 (1906); *5 Wigmore on*

Evidence (3rd Ed.) § 1456-1457; 58 Harv. L. Rev. 1, 29-31, 57. The district court erred in striking the affidavit.

B. The affidavit being admissible, the judgment of the district court should be affirmed. The scheme of Federal Rule of Civil Procedure 43(c) is that in actions tried without a jury, evidence ruled inadmissible shall be made part of the record in order that the appellate court may consider the evidence if it is admissible. This practice, early established as a part of Federal equity rules as a method of avoiding circuity in appellate proceedings, has continued under Federal Rule 43(c). *Blease* v. *Garlington*, 92 U.S. 1, 10 (1876); former equity rule 46; Advisory Committee Report accompanying Federal Rule 43(c). Since this affidavit is before this Court, this Court should, upon consideration of the affidavit, affirm the judgment of the district court. *5 Moore's Federal Practice*, p. 1352, *F. H. McGraw* v. *Milcor Steel Co.*, 149 F. 2d 301 (2nd Cir., 1945); cert. den. 326 U.S. 753. If this is done, it is not necessary to consider the following issues relating to the duties of a Trustee in Bankruptcy.

III

Respondent as Trustee in Bankruptcy is an officer of the court. As such he is held to a standard of duty and care commensurate with that office. Respondent had a duty of investigating the source of payments made to him by the Bankrupt under the turnover order.

A. A turnover order is a harsh, coercive remedy. Imprisonment is the penalty of non-compliance. Because of the drastic nature of a turnover order, there is imposed on the Trustee a correlative duty to in-

vestigate the source of money paid in under such an order so that the rights of third parties will not be impinged upon. Cf. *Maggio* v. *Zeitz*, 333 U.S. 56 (1948).

B. The installment payments made to Respondent under the turnover order in this case were made during a period from two to three years after bankruptcy. Respondent had neither title nor right of possession to property acquired by the Bankrupt after bankruptcy. 11 U.S.C.A. § 110. As the date of bankruptcy receded into the past the possibility that money paid in by the Bankrupt was after-acquired property became more of a certainty. In the face of this, Respondent could not act as a mere depository. The office he occupied required that he make the necessary inquiry to ascertain whether money tendered him was properly an asset of the Estate he was administering.

C. Respondent was not only Trustee of the Estate of Robert L. Knetzer, but also was Trustee of the Knetzer Motor Sales Company. Initially these two Estates were separate and distinct, with different creditors and different assets. Since Respondent represented two related estates, it was necessary for him to examine the source of assets tendered to him in order that he could credit the proper estate. Failure to make inquiry would result in unjustly increasing the assets of one estate to the detriment of the other.

D. Respondent had knowledge of facts indicating the Bankrupt was using money of third persons, not concealed assets, to satisfy the turnover order. Respondent knew of Knetzer's activities before bankruptcy. Respondent himself charged that the Bankrupt had concealed $250,000 in estate assets, an ac-

cusation that must have been based on facts affecting the trustworthiness of the Bankrupt. The facts of this case, plus the fact that the Bankrupt and others made small installment payments over a long period of time many months after the entry of the turnover order, gave rise to an inference that money paid in was not estate assets. Respondent thus had the duty of inquiry—a duty Respondent did not fulfill.

IV

Petitioner has adduced sufficient evidence to make out a *prima facie* case that the Bankrupt paid Respondent $27,400 which the Bankrupt had defrauded from Petitioner. Any supposed weakness in Petitioner's case must be weighed against the actions of Respondent. As Respondent failed to make any attempt to ascertain the source of payments made to him, he cannot profit from his failure to do so. Permitting the Bankrupt to pay to him money fraudulently extracted from third parties could only encourage the Bankrupt to commit more fraud.

Bankruptcy proceedings are proceedings in equity. *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 240 (1934). The trial judge who heard the evidence and observed the demeanor of the witnesses held that the equities were with Petitioner. Weighing the evidence Petitioner has adduced against the actions of Respondent, equity and good conscience demand that the judgment of the trial court be affirmed.

Respondent cannot demand other and different proof which is unavailable because he mutely accepted money tendered him instead of making the requisite investigation. The salient fact of the case is that the

transactions occurred subsequent to bankruptcy. The payments being made *after* bankruptcy, Petitioner is relieved of the burden of identifying the funds sought to be recovered. *City of New York* v. *Rassner,* 127 F. 2d 703 (2d Cir. 1942); *United States* v. *Sampsell,* 193 F. 2d 154 (9th Cir. 1951); *Hercules Service Parts Corp.* v. *United States,* 202 F. 2d 938 (6th Cir. 1953). Petitioner has sustained the lesser quantum of proof required by the circumstances. The judgment of the trial court should be affirmed.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY REFUSED TO CONSIDER APPELLEE'S CONTENTIONS IN SUPPORT OF THE VERDICT OF THE TRIAL COURT BECAUSE PETITIONER FILED NO CROSS-APPEAL

Petitioner was victorious in the trial court, obtaining a judgment of $27,400. The findings of fact supporting the judgment were favorable to Petitioner. The trial judge, however, after tentatively receiving in evidence an admission by the deceased Bankrupt, Knetzer, that he had paid $36,000 of Petitioner's money to Respondent, ordered the evidence stricken.

Respondent appealed from the adverse judgment. The appellate court ruled that the evidence did not support the finding that the Bankrupt had turned over $27,400 of Petitioner's money to Respondent Trustee, erroneously refusing to pass on the propriety of the trial court's ruling striking the Bankrupt's admission, evidence highly pertinent to the issue. The stated basis for the court's refusal to consider this ruling was Petitioner's failure to cross-appeal from the trial court's ruling striking the evidence.

A. Petitioner Could Urge Any Matter Before the Trial Court In Support of His Verdict

Having obtained a verdict in the district court, Petitioner was, without a cross-appeal, at liberty to support that verdict before the appellate court on any ground raised before the trial court. *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425 (1924); *Anderson* v. *Atherton*, 302 U.S. 643 (1937); *Mount Pleasant* v. *Beckwith*, 100 U.S. 514 (1880); *Helvering* v. *Pfeiffer*, 302 U.S. 247 (1937). Petitioner had standing to attack the reasoning of the lower court and support the judgment by adverting to matters overlooked or ignored by the trial court. *United States* v. *American Ry. Exp. Co., supra.* This rule is "inveterate and certain". *Morley Constr. Co.* v. *Maryland C. Co.*, 300 U.S. 185 (1937).

Petitioner could not, of course, be heard in opposition to the judgment nor attempt to enlarge his, or diminish Respondent's rights under the judgment. *United States* v. *American Ry. Exp. Co., supra; Langnes* v. *Green*, 282 U.S. 531 (1931).

But Petitioner did not attack the judgment of the trial court in the appellate court. To the contrary, he sought to support the judgment by contending that certain evidence stricken by the trial court was admissible. Petitioner did not seek a revision of the findings of the trial court which "carries with it as an incident a revision of the judgment". *Morley Constr. Co.* v. *Maryland C. Co., supra*, 300 U.S. at 192; cf. *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89, 99 (1954). The findings were favorable to Petitioner. He merely sought to have evidence supporting those findings declared admissible. The affidavit

was designated for inclusion in the record on appeal (R. 176).

Petitioner did not before the court below and does not here attack either the judgment or the findings of the trial court. Petitioner merely asserts an additional ground, ignored by the trial court, why the decree should be affirmed. *Anderson* v. *Atherton, supra; United States* v. *Carignan,* 342 U.S. 36 (1951).

It has been specifically held that in absence of a cross-appeal courts of review will, at the instance of appellees, pass on evidentiary rulings of the trial court. *Yoder* v. *Nu-Enamel Corp.,* 145 F. 2d 420 (8th Cir. 1944). See *Lanova Corp.* v. *National Supply Co.,* 116 F. 2d 235 (3rd Cir. 1940); *Cusack* v. *Longaker,* 95 F. 2d 304 (2nd Cir. 1938). Since Petitioner had the right to urge that all evidence supporting the findings be considered, including that improperly stricken, the court of appeals fell into error in refusing to consider that issue.*

It was the correctness of the judgment which Respondent's appeal challenged, not the basis upon which it rested. *In re Schwartz,* 89 F. 2d 172 (2nd Cir. 1937); *Century Distilling Co.* v. *Continental Distilling Co.,* 106 F. 2d 486 (3rd Cir. 1939); *cert.* den. 309 U.S. 662 (1940). Petitioner had the right to support the judgment by urging consideration of erroneous evidentiary rulings of the trial court, if any. A cross-appeal was not a condition precedent to that right. The contrary ruling of the appellant court must be reversed.

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* The Court of Appeals must affirm the judgment if it finds in the record any reason which it considers sound, even though the district judge may have rejected that reason and rested his decision on some other ground. *Dean* v. *Davis,* 212 Fed. 88, 89 (4th Cir. 1914); aff. 242 U.S. 438 (1917).

B. Petitioner, Not Being An Aggrieved Party, Had No Standing To Cross-Appeal From the Judgment of the District Court

Petitioner was the prevailing party in the district court. The judgment as well as the findings of the district court were favorable to Petitioner.

A successful party in the trial court has no standing to appeal from a decree in his favor.* In order to have standing to appeal, a party must be aggrieved by the judgment entered. *Corning* v. *Troy Iron & Nail Factory,* 56 U.S. 451, 14 L. Ed. 768 (1853); *Zoline's Fed. App. Juris. & Proc.* (3rd Ed.) § 138, or by findings of fact necessary to the decree. *Partmar Corp.* v. *Paramount Theatres Corp.,* 347 U.S. 89 (1954), but cf. dissenting opinion 347 U.S. at 109; *Morley Constr. Co.* v. *Maryland C. Co., supra.* Petitioner, aggrieved by neither, could not cross-appeal.

To be sure, Petitioner could have appealed from the failure of the district court to award him the entire sum demanded in his complaint. But the action of the trial court refusing recovery of the entire sum and

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* *Public Service Com.* v. *Brashear Freight Lines,* 306 U.S. 204 (1939); *New York Teleph. Co.* v. *Maltbie,* 291 U.S. 645 (1934); *Lindheimer* v. *Illinois Bell Teleph. Co.,* 292 U.S. 151 (1934); *Harding* v. *Federal National Bank,* 31 F. 2d 914 (1st Cir. 1929); *In re Schwartz,* 89 F. 2d 172 (2nd Cir. 1937); *Lanova Corp.* v. *National Supply Co.,* 116 F. 2d 235 (3rd Cir. 1940); *United Engineering and Foundry Co.* v. *Cold Metal Process Co.,* 68 F. 2d 564 (3rd Cir. 1934), *cert.* den. 291 U.S. 675; *Aberly* v. *Craven County,* 70 F. 2d 52 (4th Cir. 1934); *Ottenheimer Bros.* v. *Libuwitz,* 74 F. 2d 858 (4th Cir. 1935), *cert.* den. 296 U.S. 582; *Mach* v. *Abbott Co.,* 136 F. 2d 7 (8th Cir. 1943), *cert.* den. 320 U.S. 773; *United States* v. *Adamant Co.,* 197 F. 2d 1 (9th Cir. 1952), *cert.* den. 344 U.S. 903 (1952).

rendering a judgment for $27,400 was correct.* The evidence supports the court's ruling on this issue and Petitioner was and is content with the judgment. It is established that parties who are satisfied with their judgment cannot confer jurisdiction on appellate courts to decide alleged errors in the trial by cross-appealing their favorable judgment. *Midland Valley R. Co.* v. *Fulgham,* 181 Fed. 91 (8th Cir. 1910).

Even more basic, however, is that Petitioner had nothing to appeal from. Any cross-appeal would be limited to demonstrating error in the court's failure to grant a judgment for $36,000. The evidentiary ruling striking the Bankrupt's affidavit from evidence had no bearing on the amount of recovery. Other evidence indicated to Petitioner that the trial court's finding in this regard was correct. Consequently, the ruling on the affidavit would not even be relevant to the issues raised by Petitioner's cross-appeal.

Since Petitioner, not being aggrieved, had no standing to cross-appeal, the holding of the appellate court that Petitioner should have cross-appealed at penalty of waiver is erroneous. This error was compounded by the revising of the mandate at Respondent's request so as to peremptorily order that judgment be entered for Respondent instead of remanding the cause for further proceedings as the original opinion had directed.

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* A mathematical deduction indicates that the trial court refused recovery of the December 7, 1950 payment of $3,800 which was to be paid into court, and the payment of $4,800 on October 1, 1951 which was secured by a mortgage which Petitioner later surrendered (R. 54, 109, 127, 132).

By effectively barring appellate review of the erroneous evidentiary ruling of the trial court, the court of appeals has deprived Petitioner of his day in court.

II. THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED

A. The Declaration Against Interest of the Bankrupt Was Admissible Against His Trustee

Federal Rule of Civil Procedure 43(a) states that evidence in district courts shall be admitted where admissible under statutes of the United States, former rules of evidence in equity or under rules of evidence of the courts of the jurisdiction in which the district court is held. The statute or rule *"which favors the reception of the evidence governs"*.* The affidavit of the Bankrupt, Petitioner's Exhibit 24, stricken below, is clearly admissible under Illinois law.

The affidavit of the bankrupt, an extrajudicial statement under oath, is admissible as a declaration against interest. Even an *unsworn* oral statement would be admissible under this well-defined exception to the hearsay rule. The statement is clearly a declaration against interest. The Bankrupt admitted obtaining over $47,980 from Petitioner and a breach of his obligation to Petitioner to utilize the funds for the fictitious Bison Development Corporation.**

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* Emphasis added.

** The affidavit in question executed by the Bankrupt under oath on August 1, 1952, is as follows:

> "That during the period from December 7, 1950, to October 23, 1951, I, Robert L. Knetzer, borrowed the sum of $47,980.00 (Forty-seven thousand nine hundred eighty & no/100 dollars) from Robert W. Jaffke, of St. Louis, Missouri, and that during the period of December 7, 1950 to November 1, 1951, I paid

In the affidavit the Bankrupt admitted that he had obtained $47,980.00 from Petitioner. It appearing that the Bankrupt-declarant was dead at the time of trial (R. 35), it is settled Illinois law that an admission by the decedent that he had obtained money from Petitioner is admissible as a declaration against interest. *Schell* v. *Weaver*, 225 Ill. 159, 80 N.E. 95 (1906). The rule is overwhelmingly accepted in other jurisdictions. 5 *Wigmore on Evidence* (3rd Ed.) Sec. 1456-1457.*

As one portion of the affidavit was admissible as a declaration against interest the entire declaration was admissible. As Wigmore puts it:

> "In other words, the statement may be accepted, not merely as to the specific fact against interest, but also *as to every fact contained in the same statement.*" 5 *Wigmore on Evidence* (3rd Ed.) Sec. 1465.**

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the sum of $36,000.00 (Thirty-six thousand dollars) from the above borrowed sum of $47,980.00 to Wm. C. Dunham, Trustee in Bankruptcy of Robert L. Knetzer, for purposes of remaining out of jail. I am of sound mind and body and no threats or promises were made to me in order to obtain this statement."

* "The clearest case of a declaration stating a liability of the declarant is one conceding a liquidated indebtedness of the declarant to another. 'I owe John Smith $100' is a typical declaration against pecuniary interest. Declarations of general indebtedness, such as 'I am indebted to John Smith', are equally admissible. A declaration need not concede specifically an indebtedness in order to come within the concept of pecuniary interest. A statement of facts which clearly create a contractual liability of the declarant is considered equally contrary to pecuniary interest." 58 Harv. Law. Rev. 1, at pages 29-30.

** "From the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement." 58 Harv. Law. Rev. at 57.

The statement in the affidavit that the Bankrupt "paid the sum of $36,000 (thirty-six thousand dollars) from the above borrowed sum of $47,980.00 to Wm. C. Dunham, Trustee in Bankruptcy of Robert L. Knetzer . . ." is equally admissible as a declaration against interest. Petitioner's testimony which was accepted by the trial and appellate courts was that the money defrauded from him by the Bankrupt was to be used in the furtherance of the objectives of the Bison Development Company. That the declaration was against the declarant's interest may of course be shown by independent evidence. 5 *Wigmore on Evidence* (3rd Ed.) § 1468. By the affidavit the Bankrupt admitted that he had improperly diverted a portion of the funds obtained from Petitioner to the Respondent. That declaration would thus subject the Bankrupt to an action for fraud and is consequently admissible as a declaration against his interest even apart from the related declaration that he had obtained $47,980 from Petitioner. *Citizens National Bank* v. *Santa Rita Hotel Co.*, 22 F. 2d 524 (9th Cir. 1927).* Even more convinc-

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* "On principle, it would seem that a declaration conceding a tortious liability stands on the same footing as a declaration conceding a contractual obligation. The pecuniary interest of the declarant is affected in the same manner by both types of declarations. The likelihood of the declarant's having to respond for his tortious conduct is equally as strong as for his liability in contract. This is certainly true if the declaration relates a clear and obvious case of tortious liability. The courts have had no difficulty in classifying declarations stating facts creating a tortious liability in a definite amount within the concept of pecuniary interest. A number of decisions have held admissible declarations by employees that they had embezzled or stolen stated amounts of money from their employers. Even in the case of declarations relating to tortious liability in an unliquidated amount, the courts have usually admitted such declarations where intentional torts were conceded by the declarations." 58 Harv. Law Rev. 1 at page 31.

ing is that the declaration would have *deprived the Bankrupt of a credit of $36,000 under the turnover order* thus subjecting him to longer imprisonment. The affidavit being clearly admissible as a declaration against interest, the trial court erred in striking such affidavit from the record.

The circumstances surrounding the execution of the affidavit also attest to its trustworthiness. R. W. Heinze, an Illinois attorney, was handed the unsigned affidavit by Petitioner who had prepared it on the basis of information supplied him by the Bankrupt. (R. 112). Heinze was on his way to confer with the Bankrupt, who on this particular time was again in jail. Heinze showed Knetzer the affidavit and, in response to an inquiry by Knetzer as to whether he should sign it, Heinze told him "you cannot sign anything unless it is true". (R. 103-104). Heinze obtained permission from "officials of the government" to present the affidavit to Knetzer. (R. 104). Mr. Heinze was present when the Bankrupt was sworn to the truth of the facts stated in the affidavit by the notary public (R. 104). Heinze then returned the signed and notarized affidavit to Petitioner (R. 105). The notary public testified that he had sworn the Bankrupt to the truth of the contents of the affidavit and then notarized it (R. 74-75).

The affidavit was clearly admissible.

B. Since the Evidence Was Properly Admissible the Judgment of the District Court Should Be Affirmed

Since, as has been demonstrated, the affidavit of the Bankrupt Knetzer admitting that he had turned $36,000 of Petitioner's money over to the Trustee in

Bankruptcy was improperly stricken, the next question is the proper disposition of the case. As appears from the record the affidavit was admitted into evidence and was not stricken until after trial had concluded. Petitioner designated the affidavit to be included in the appellate record (R. 176). Respondent, while the affidavit was in evidence, had the opportunity to contradict it or adduce evidence going to the weight to be accorded the affidavit. He did neither. Since there is no evidence in the record (nor elsewhere) to contradict the admission that Petitioner's money was turned over to Respondent the only proper disposition of the case is to affirm the judgment of the district court.*

Where evidence which has been excluded or stricken by the trial court is before the appellate court, the reviewing court should consider such evidence and, if possible, make a decision as though such evidence had been properly admitted in the first instance. It was early established by this court that the appellate tribunal, if necessary, should consider excluded evidence and render a decision based thereon to avoid the circuity of action which would otherwise result. *Blease* v. *Garlington*, 92 U.S. 1, 10 (1876). Nothing but delay and added expenses would ensue if this case were remanded to either the appellate court or to the district court to reopen the record, to consider the uncontroverted evidence contained in the affidavit, and to render judgment accordingly.

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* At the trial Respondent refused to deny that he had testified at an earlier proceeding that the Bankrupt had given him money which the Bankrupt stated had been obtained from Petitioner (R. 88-89).

In *Blease* v. *Garlington, supra,* this Court adverted to the fact that it had earlier adopted equity rules requiring a record to be made of excluded evidence which would be transmitted to the reviewing court if an appeal were taken. The purpose was to allow appellate tribunals to pass on the excluded evidence if necessary to reach a decision, thus avoiding remanding the case for further hearing. See also *Nelson* v. *United States,* 201 U.S. 92, 114, 115 (1906). The practice approved in *Blease* v. *Garlington, supra,* continued as an integral part of federal equity practice. See Supreme Court Equity Rule 46, 28 U.S.C. Section 730 (1934 ed.). With the adoption of the Federal Rules of Civil Procedure in 1938, the practice has been continued until the present time. Thus Federal Rule of Civil Procedure 43(c) provides:

> "Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

That the above rule was designed to continue the practice under former Equity Rule 46 is clear from the report of the Advisory Committee accompanying Rule

43(c).* The requirement of the Rule is that the lower court should, at minimum, make a record of all evidence proffered in order that appellate court if it disagrees with the lower court's conclusion may render a proper judgment without remanding the case for further trial. 5 *Moore's Federal Practice,* 2nd Ed., p. 1352. If the excluded evidence is, as here, before the appellate court, the court should consider it if admissible, even where it has been excluded by the trial court. *ibid.; F. H. McGraw* v. *Milcor Steel Co.,* 149 F. 2d 301 (2d Cir. 1945); cert. den. 326 U.S. 753. See also *Kauk* v. *Anderson,* 137 F. 2d 331, 334-335 (8th Cir. 1943); *Thompson* v. *Carley,* 140 F. 2d 656 (8th Cir. 1944); *Garden City Feeder Co.* v. *Commissioner of Internal Revenue,* 75 F. 2d 804, 807 (8th Cir. 1935); *United States* v. *Jones,* 176 F. 2d 278 (9th Cir. 1949); *First National Bank of Atlanta* v. *Southern Cotton Oil Co.,* 78 F. 2d 339 (5th Cir. 1935); *Hughes* v. *Reed,* 46 F. 2d 435, 442 (10th Cir. 1931).

As the court stated in *Unkle* v. *Wills,* 281 Fed. 29 (8th Cir. 1922), cited by the Advisory Committee in its note to Federal Rule 43(c):

> "It is equally well settled that, even if objections to evidence are sustained in equity cases, it is the duty of the court to have them answered and included in the record, so that, if the appellate court

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* The Advisory Committee report states: "Note to Subdivision (c). See Equity Rule 46 (Trial-Testimony Usually Taken in Open Court-Rulings on Objections to Evidence). With the last sentence compare Dowagiac v. Lochren, 143 Fed. 211 (CCA 8th, 1906). See also Blease v. Garlington, 92 U.S. 1 (1876); Nelson v. United States, 201 U.S. 92, 114 (1906); Unkle v. Wills, 281 Fed. 29 (CCA 8th, 1922)."

finds that the chancellor erred in his rulings, the cause need not be remanded to have the requested testimony retaken." (p. 34).

Since the rule under the former equity practice permitting the appellate court to consider excluded evidence in reaching its decision has been embodied in current practice by Federal Rule of Civil Procedure 43(c), it follows that this court should, after considering the declaration against interest of the Bankrupt Knetzer, affirm the judgment of the district court.

III. A TRUSTEE IN BANKRUPTCY HAS THE DUTY OF INVESTIGATING THE SOURCE OF PAYMENTS MADE TO HIM IN PURPORTED COMPLIANCE WITH A TURNOVER ORDER

A Trustee in Bankruptcy has a responsibility to prevent his office from being used in derogation of the rights of third parties. Respondent generally, and particularly under the facts of this case, had the duty of investigating the source of assets tendered to him in his official capacity.

A. The Compulsion of a Turnover Order Imposes a Correlative Duty on the Trustee in Bankruptcy To Investigate the Source of Funds Paid Under the Order

After Knetzer was adjudged bankrupt on October 21, 1948 (R. 165), a turnover order was entered July 11, 1949, directing the Bankrupt to pay $250,000 to Respondent as Trustee in Bankruptcy, "forthwith" (R. 144). Respondent filed a motion to show cause and the Bankrupt was held in contempt of court on December 1, 1949, for failing to comply with the turnover order (R. 145-148). His imprisonment was stayed until March, 1950, at which time the Bankrupt was imprisoned. (R. 165). He was released from jail for varying periods of time in order to obtain money

to buy his freedom by making installment payments to the Trustee.

A turnover order addressed to a bankrupt is as drastic a coercive remedy as the bankruptcy court may invoke. In turnover proceedings "coercive methods by imprisonment are probable and are foreshadowed." *Oriel* v. *Russell,* 278 U.S. 358, 363 (1929). Common knowledge reveals that a threat of incarceration may drive one beyond the pale of the law in a distraught effort to avoid loss of freedom.

A trustee in bankruptcy is an officer of court. As such he has a special duty imposed upon him in cases where a turnover order has been entered. That duty is the protection of innocent third parties and perhaps the bankrupt whose actions to avoid imprisonment may lack the rational, well-considered judgment of an individual not acting under judicial duress.

This Court in *Maggio* v. *Zeitz,* 333 U.S. 56 (1948) recognized the possibility that a turnover order—with its implied threat of imprisonment for non-compliance —could "exert pressure on friends and relatives to ransom the accused party from being jailed". 333 U.S. at 64. In the absence of friends and relatives the bankrupt who is unable to comply with the order must fall back on his own resources. One result is found in the facts of this case. Petitioner, an innocent third party, was defrauded by the Bankrupt during the period December 7, 1950 to November 1, 1951. The fraud was accomplished when the Bankrupt, a civil contemnor, had been released from prison for the express purpose of obtaining funds to satisfy the turnover order. Respondent even used his own office to obtain extensions of time during which the Bankrupt

could remain out of prison. Had the Bankrupt a penchant for the use of violence rather than fraud, a more tragic situation could be spread on this record.

It is of course impossible to insure absolutely that the bankrupt will not perform criminal or "shady" acts in his frantic efforts to satisfy a turnover order and avoid jail. A strong deterrent, however, would be a searching inquiry by the trustee into the source of moneys paid into him in purported compliance with a turnover order. Knowledge by the bankrupt that monies obtained by fraud or other criminal conduct would be unacceptable to the trustee would stifle any incipient tendency to criminality.

It is abhorrent to established concepts of justice and fairness that a trustee in bankruptcy may act as a mere conduit of money or property—becoming thus, albeit unwittingly, a depository for the property of an innocent third party.* The office of trustee in bankruptcy is not so circumscribed as to prohibit investigation and an exercise of discretion as to what funds are properly assets of the estate being administered. The contrary is obviously true.

The trustee may not stand mute and accept property paid to him under judicial duress, assuming it properly comes into his custody. The discretion of the office must be exercised, by testing, by probing to ascertain the source and ownership of property paid into him under duress, *i.e.*, under the compulsion of a turnover order. That the rights of innocent third

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* "Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it." *Bridgman* v. *Green*, 2 Ves. Sr. 627, Wilm. 58, 65 (1755).

parties will not be impaired, that the creditors of the estate will not be unjustly enriched, the trustee must comply with the duty of scrutiny which is imposed upon him by virtue of his office.

B. The Trustee Had the Duty of Ascertaining If Monies Paid to Him Constituted After Acquired Property

While the element of duress in compliance with turnover orders imposes a correlative duty of inquiry on the Trustee, the facts of this case disclose additional bases upon which such a duty rests.

Knetzer was adjudged a bankrupt October 21, 1948. On July 11, 1949, the turnover order in question was entered. Approximately seventeen months after the turnover order, during the period commencing December 7, 1950, the Bankrupt was still making the installment payments to Respondent which are the subject of this controversy. These payments continued to October 23, 1951. Indeed, other payments were made until February, 1952.

Respondent had no title to any property acquired by the Bankrupt after his adjudication as such, with certain exceptions not here applicable. 11 U.S.C.A., § 110; 4 *Collier on Bankruptcy* (14th ed.), § 70.09; *Clay* v. *Waters,* 161 Fed. 815 (8th Cir. 1908). As to property coming into his possession, Respondent was not considered an innocent purchaser for value. *Zartman* v. *First Nat. Bank,* 216 U.S. 134 (1910). Since Respondent had no authority to accept after acquired property of the Bankrupt, having neither title thereto nor right of custody thereof, he had the obvious duty of ascertaining whether property tendered to him was after acquired property or not. This duty of inquiry becomes more pronounced and

more important as the date of the bankruptcy recedes into the past. For as time passes the possibility that property possessed by the Bankrupt was acquired subsequent to his bankruptcy becomes more certain. With the passage of sufficient time this possibility ripens into a certitude.

Respondent could not ignore this fact in accepting money paid to him as Trustee *from two to three years after* the Bankrupt had been adjudged as such. Certainly the possibility that the money paid Respondent in 1950 and 1951 by the Bankrupt was acquired subsequent to his bankruptcy had become strong enough to require an initial scrutiny by Respondent to ascertain if the money was properly his. The duty to locate and marshal assets, *Avery* v. *Cleary*, 132 U.S. 604 (1890), of necessity carries with it the duty to ascertain whether the Trustee has the right to possess the property.

The entry of the turnover order on July 11, 1949, did not affect this duty. The Bankrupt was adjudged in contempt for failure to comply with the order in December, 1949. The Bankrupt was imprisoned in March of 1950 but was released at varying times supposedly to locate the hidden assets required to be paid to Respondent under the turnover order. Whatever presumption there might be that the Bankrupt had $250,000 in July of 1949, it could not continue *ad infinitum* to relieve Respondent of his duty to inquire into the source of funds paid to him. Imprisonment of the Bankrupt and passage of sufficient time would certainly dispel any such presumption. Cf. *Maggio* v. *Zeitz, supra.*

Respondent, after the Bankrupt was jailed as a contemnor and after seventeen months had elapsed since

the entry of the turnover order, could not blindly accept money tendered him without ascertaining whether such money was properly his. Respondent had no right to take property not belonging to the Bankrupt. *In re Allee,* 55 F. 2d 76 (7th Cir. 1932). His was the duty of inquiry, a duty singularly unfulfilled.

C. Respondent, as Trustee of Two Related Estates, Was Required To Ascertain To Which Estate Assets Tendered Him Should Be Credited

Yet another basis for Respondent's duty of inquiry is presented on the record. Respondent was appointed Trustee of Knetzer Motor Sales Company on December 3, 1948, and Trustee of the Estate of Robert L. Knetzer on December 10, 1948 (R. 76).

The turnover order of July 11, 1949, required the Bankrupt to pay the $250,000 to Respondent *as Trustee of the Estate of Robert L. Knetzer.* The order expressly declared that Respondent *as Trustee for Knetzer Motor Sales Company was "not entitled to* any turnover order against Robert L. Knetzer" (Pet. Exh. 1, R. 144, 135-6).

It should be emphasized that the assets of the two Estates, that of Robert L. Knetzer and that of the Knetzer Motor Sales Company, initially, were considered to be separate and distinct. Creditors of the two Estates were not identical. (R. 138, 161-164; Defs. Exh. 1). Because of the dual role of the Trustee—representing two Estates and two different groups of creditors the Trustee had the obvious duty of inquiry to ascertain which assets coming into his hands belonged in which Estate. Assets tendered to the Trustee were required to be identified and credited to the proper Estate. Failure to properly differentiate be-

tween the assets of the two Estates would result in an unjust benefit to one Estate in derogation of the rights of creditors of the other.

This dual representation placed an initial duty on the Respondent of inquiry into the source of assets coming into his custody. A proper identification of the source of the assets was a necessity if Respondent were properly to segregate the assets of the Estates under his control. Even a token compliance with this duty is lacking here.

D. The Trustee Had Knowledge of Facts Putting Him on Notice that the Bankrupt Was Not Paying in Concealed Assets

Respondent had knowledge of sufficient facts to put him on knowledge, actual or constructive, that the Bankrupt was not paying in concealed assets. Respondent certainly had knowledge of Knetzer's fraudulent activities before bankruptcy (R. 182). Respondent knew that a large number of claims against the two Estates had been filed and that the assets of those Estates were but a small fraction of such claims (Def. Exh. 1, R. 161-164). The proceedings culminating in a turnover order were initiated by a petition verified by Respondent. Consequently, he must have had, at minimum, reason to believe that the Bankrupt had concealed assets and was a person not to be trusted (Pet. Exh. 1, R. 144, 317).

As early as April, 1950 Respondent heard testimony of third parties and the Bankrupt under oath that the latter had been "borrowing" from such third parties (R. 38-39, 84, 90-91). If verification of this testimony were needed, it came when third persons made payments to Respondent under the turnover

order (R. 80, 82-84). In one instance, a third party making such payments (Rhoades) told Respondent that he was making payments for the Bankrupt and that "he would be responsible for a thousand dollars a day" (R. 84).

The Bankrupt informed Respondent that he was engaged in many "business ventures", including the "Christmas tree" and "Teapot Dome" "deals" (R. 83, 86). While Respondent knew that the Bankrupt had been imprisoned for failure to comply with the turnover order, he knew that the Bankrupt was "in and out of jail" and while out of jail was not in the custody of a marshal (R. 77, 85).

Perhaps the most significant fact, however, is that Respondent refused to deny that he may have testified before a grand jury in 1952 that he had received in excess of $5,000 from the Bankrupt in 1951, which the Bankrupt told him had been obtained from Petitioner (R. 88-89).

At minimum, Respondent had knowledge from the above facts that the Bankrupt was not to be trusted. Cf. *Watchmaker* v. *Barnes,* 259 Fed. 783 (1st Cir. 1919). *1 Merrill on Notice,* § 173. The facts were sufficient to excite inquiry in a prudent man. A concomitant duty to investigate immediately arose. Cf. *Avery* v. *Cleary,* 132 U.S. 604 (1890).*

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* Respondent, of course, had the statutory duty of reporting possible violations of the bankruptcy laws of the United States to the appropriate United States Attorney. 18 U.S.C.A., § 3057.

IV. RESPONDENT MAY NOT PROFIT FROM HIS FAILURE TO MAKE THE NECESSARY INQUIRY DEMANDED BY THE CIRCUMSTANCES OF THIS CASE

It is undisputed that Respondent failed to make even the most rudimentary investigation of the source of funds paid to him under the turnover order. He admitted at the trial that he had made no such inquiry when payments were made to him (R. 87, 79-80). He also admitted that he never had any evidence that the payments made to him under the turnover order constituted concealed assets of the Estate (R. 93-94). Respondent knew that when the Bankrupt was out of jail he was not in the custody of a United States Marshal (R. 77, 85). There is no evidence that Respondent reported this fact to any responsible authorities. The opposite is true, for Respondent admitted that he called his attorney or the district judge on several occasions to obtain permission for the Bankrupt to remain out of jail (R. 85). Respondent, in the face of a duty to inquire into the source of payments made to him, and ignoring completely facts which would have excited the interest of a prudent man, as an officer of the court cannot now in equity and good conscience be permitted to retain funds which he should have known were not properly part of the Estate in bankruptcy. To deny Petitioner recovery in this case, would be "condoning improper action by a trustee so long as he could successfully get away with it." *City of New York* v. *Rassner,* 127 F. 2d 703 (2nd Cir., 1942).

It appears that the evidence in this case *at a minimum* establishes *prima facie* that Respondent holds Petitioner's money. Before his death, the Bankrupt admitted paying over Petitioner's money to Respond-

ent. No one was in a better position than the Bankrupt to testify to this fact.

The record of payments to the Trustee is also strong evidence that Petitioner's money had been paid in under the turnover order. Thus, between May 28, 1950, and September 15, 1950, Riley paid Knetzer $32,389. Knetzer paid to the Trustee under the turnover order $32,076.28 between July 28, 1950, and October 28, 1950 (R. 193). It is no mere coincidence that the two figures are so nearly identical.

Petitioner paid the Bankrupt $47,980 between December 7, 1950 and October 22, 1951. During that same period from April 14, 1951 to June 1951, Petty paid the Bankrupt $44,000. Respondent testified that in the period corresponding to the time Petitioner was making payments to Knetzer, December 7, 1950 through October, 1951, he had received a total of $75,923.72 under the turnover order (R. 87). Subtracting the $44,000 which Petty paid the Bankrupt from the total received by Respondent during the period in question, that is $75,923.72, there is a balance of $31,923.72. Certainly these facts considered with other evidence adduced by Petitioner corroborate strongly the fact that the Bankrupt paid a substantial part of Petitioner's money to Respondent.*

It was stipulated at the trial that one Sammons would testify that he had paid the Bankrupt $101,550 between *November* 1, and February 1, 1952 (R. 138). Any payments made from Sammons' money would be

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* All these payments were a record in the bankruptcy proceedings, and the trial court could take judicial notice of them. Freeman-Sweet Co. v. Luminous Unit Co., 264 Fed. 107 (7th Cir. 1919); cert. den. 253 U.S. 486.

beyond the period involved in this suit. Also beyond the period involved in this suit were the payments by Rex Rhoades, whose first payment to Respondent was made on November 13, 1951 (R. 82). When the payment record is thus analyzed it supports the declaration by the Bankrupt that he turned $36,000 of Petitioner's money over to the Trustee. The court of appeals analysis is thus incorrect.

Respondent cannot defend by helplessly declaring that he does not know to whom money paid in under the turnover order belongs when he had the duty of ascertaining that very fact.* Any weakness in Petitioner's proof must be weighed against the fact that Respondent may not profit from his own dereliction. This is inherent in the case since bankruptcy proceedings are governed by equitable principles. *Pepper* v. *Litton,* 308 U.S. 295 (1939); *Local Loan Co.* v. *Hunt,* 292 U.S. 234, 240.**

In weighing the evidence another factor cannot be ignored. The salient, undisputed fact is that the fraud and the installment payments to Respondent occurred *after,* not before, bankruptcy. Such acts occurred while the Bankrupt, an adjudged contemnor, was either in jail or in the actual or constructive custody of the bankruptcy court. In these circumstances, Peti-

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*In Petitioner's Exhibit 29 (R. 204, 167) also stricken by the trial court, Mr. Doyle, United States Attorney, pointed out to the court in an earlier proceeding that the Bankrupt had promised in June, 1950, to pay in $225,000 within six days (R. 206).

**Significantly, the trial judge who heard the evidence and observed the demeanor of the witnesses specifically held that the equities of the case were with Petitioner (R. 166).

tioner, as the beneficiary of a constructive trust, need not identify his money in the hands of Respondent. *City of New York* v. *Rassner,* 127 F. 2d 703 (2d Cir. 1942); *United States* v. *Sampsell,* 193 F. 2d 154 (9th Cir. 1951); *Hercules Service Parts Corp.* v. *United States,* 202 F. 2d 938 (6th Cir. 1953). The determining fact in each of the last cited cases was that the trust relationship arose *subsequent* to bankruptcy. In the *Hercules* case, there was no evidence that the "assets of the debtor were augmented by the payments." 202 F. 2d at 940. The court there emphasized that if the beneficiaries' claim were upheld, the creditors would "receive no less than that to which they were originally entitled and that which they would have received if the officer of the law had performed his obligation." 202 F. 2d at 941.*

Under the doctrine of the last-cited cases the quantum of proof necessary for Petitioner to sustain his case is substantially less than if the fraud had occurred *prior* to bankruptcy. See *Standard Oil Co.* v. *Hawkins,* 74 Fed 395 (7th Cir. 1896).

Weighing Petitioner's evidence against the conduct of Respondent acting as an officer of the bankruptcy court, as must be done in a proceeding "inherently" one in equity, *Local Loan Co.* v. *Hunt, supra,* it is clear that the judgment of the trial court was correct. To permit Respondent, an officer of the court, to retain property accepted with neither inquiry nor investigation when the circumstances commanded both would be a vicious and inequitable result.

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* Significantly, District Judge Briggle stated in an earlier proceeding, money "unlawfully obtained" is "not acceptable to the trustee . . ." (R. 206).

As the court stated in *Ex Parte James,* 9 Ch. App. 609, quoted in *Standard Oil Co.* v. *Hawkins, supra*:

> "That a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among creditors. The court, then, finding that he has money in his hands which, in equity, belongs to some one else, ought to set an example to the world, by paying it to the person really entitled to it. In my opinion, a court of bankruptcy ought to be as honest as other people."

The judgment of the trial court should be affirmed.

CONCLUSION

The court of appeals' refusal to consider evidentiary rulings in the absence of a cross-appeal is patently erroneous. Since the disputed evidence is before this Court and is clearly admissible, the judgment of the district court should be affirmed. An additional ground for affirming the judgment of the district court is the failure of the Respondent as Trustee to shoulder the duty of inquiry that was his. The judgment of the trial court was correct.

Respectfully submitted,

CHAUNCEY P. CARTER, JR.
HERBERT J. MILLER, JR.
800 World Center Building
Washington 6, D. C.

WILLIAM M. GIFFIN
First National Bank Building
Springfield, Illinois
Attorneys for Petitioner

Of Counsel
KIRKLAND, FLEMING, GREEN,
[illegible] & ELLIS

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No. 60

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

ROBERT W. JAFFKE, *Petitioner*

v.

WILLIAM C. DUNHAM, TRUSTEE OF THE ESTATE OF ROBERT L. KNETZER, BANKRUPT, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

CHAUNCEY P. CARTER, JR.
HERBERT J. MILLER, JR.
800 World Center Building
Washington 6, D. C.

WILLIAM M. GIFFIN
First National Bank Building
Springfield, Illinois
Attorneys for Petitioner

Of Counsel

KIRKLAND, FLEMING, GREEN,
MARTIN & ELLIS

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

"In one of the finest passages in judicial literature, Chief Judge Cardozo of the New York Court of Appeals—later Associate Justice of the United States Supreme Court—laid down the high standards that should be demanded of a trustee:

> "'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, *but the punctilio of an honor the most sensitive,* is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particualr exceptions. (Case cited.) Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.' (Emphasis supplied.)

> *"Imposed both by ethics and equity, these high standards are exacted of bankruptcy trustees as much as of other species of the genus."* (Emphasis supplied.)

Respondent's failure to come forward with any authority to support the Court of Appeals ruling on the cross-appeal issue is a convincing demonstration that the ruling is erroneous. Petitioner did not in the Court of Appeals and is not here attempting to increase the judgment in his favor in the district court. Petitioner seeks only to support that judgment. Respondent's implications to the contrary are unsupportable.

The argument found in Respondent's brief is substantially identical with that made before the district court. That court, having the benefit of observing the demeanor of the many witnesses while hearing their testimony, entered judgment against Respondent. It must be remembered that the district court found that the Petitioner had been defrauded and that finding was affirmed in the Court of Appeals (R. 182) notwithstanding Respondent's contrary assertion. Respondent's similar argument in the Court of Appeals succeeded in one aspect only, that Petitioner had not shown by a reasonable inference that Respondent held Petitioner's money, a success attributable to the failure of the court to consider all of the evidence.

Knetzer's written statement under oath should have been considered by the Court of Appeals. It was a declaration against interest when made. The cases relied on by Respondent here involve in each instance declarations not against interest because the declarant had parted with the property. Here the declaration was against interest not because Knetzer at one time held money defrauded from Petitioner but because the declaration subjected him to pecuniary liability both contractual and tortious. Clearly then the district court's judgment was correct and should be affirmed.

The argument that Petitioner was improperly permitted to testify (Resp. Br. p. 53) is fully and correctly answered by the decision of the Court of Appeals (R. 181-82). The mere fact that Respondent would make such an argument without cross-petition for certiorari completely undercuts Respondent's attempt to support the ruling of the lower court on cross-appeals.

CONCLUSION

The only just and proper disposition is to affirm the judgment of the district court. The affidavit which places Petitioner's funds in the hands of Respondent is clearly admissible. The appellate court erroneously failed to consider the statement because no cross-appeal was filed. It follows that the judgment of the trial court should be affirmed.

Respectfully submitted,

CHAUNCEY P. CARTER, JR.
HERBERT J. MILLER, JR.
800 World Center Building
Washington 6, D. C.

WILLIAM M. GIFFIN
First National Bank Building
Springfield, Illinois
Attorneys for Petitioner

Of Counsel

KIRKLAND, FLEMING, GREEN,
MARTIN & ELLIS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 60

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DURHAM, Trustee of the Estate of ROBERT L. KWETKEN, Bankrupt, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

G. W. HOSELEY
L. H. LEWIS
408 East Adams Street
Springfield, Illinois
Attorneys for Respondent.

[illegible] & SAUNDERS, PRINTERS, SPRINGFIELD, ILL.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 845

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DUNHAM, Trustee of the Estate of ROBERT L. KNETZER, Bankrupt, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Respondent takes issue with the first question presented by Petitioner. Ordinarily, rulings by the Court on evidentiary matters may be considered by the Circuit Court of Appeals, even though no cross-appeal is filed. However, this rule does not apply where to do so would enlarge the rights of the Petitioner over and above the judgment rendered in his favor and further, where the opinion shows that such matters were given full consideration by

the court. The statement in the opinion that the affidavit of the Bankrupt was not considered because no cross-appeal was filed is mere dicta and is not decisive of the issue involved because of the reasoning of the Court. Further, the law is clear that such affidavit was not admissible in the first instance. The opinion of the Court was correct.

As to the second question presented, Respondent contends that since he was following the mandate of the District Court in collecting moneys on a turn-over order, which said order specifically found that the Bankrupt had the money and assets in his possession, that he had a right to assume that any payments made to him were made upon said turn-over order out of the concealed assets held by the Bankrupt, and that the Trustee was under no obligation to trace down each and every one of such payments.

STATEMENT

The turn-over order mentioned by Petitioner (R. 144) found that the Bankrupt "has in his possession or under his control the sum of $250,000.00 which should be turned over to the said William C. Dunham as Trustee for his bankrupt estate as a part of the assets belonging to said bankrupt estate at the time of the filing of the petition of bankruptcy herein, for the benefit of the creditors of the said Robert L. Knetzer."

The statement by Petitioner, on page 3, that the Bankrupt was released from confinement upon his undertaking to locate assets, is not contained in the record. The only reference in the record, on page 166, is to the effect that "upon his release from confinement in jail, attempted to purge himself of a contempt citation by making installment payments to his Trustee in Bankruptcy."

The statement by the Petitioner, on page 3, "in fact his freedom on several occasions was requested by Respondent" (R. 85) is erroneous. Page 85 shows just the opposite to be true, because the Trustee testified that he did not request it but that on some occasions when the Bankrupt was out of jail, he would ask to be permitted to have additional time.

Concerning the statement by Petitioner that the Bankrupt was released from custody, even the Petitioner testified that he noticed in the newspaper that the Bankrupt was supposed to be in the custody of a Marshal and that the Bankrupt told him it was all paper talk and that all he had to do was report from time to time on his whereabouts. (R. 51.) The Court says in its opinion:

"The Court permitted Knetzer to leave the jail

on different occasions in the custody of the United States Marshal or of bailiffs of the court." (App. 3a.)

The record in this case is fairly long and the opinion of the Circuit Court of Appeals fairly accurately reports some of the evidence and the reasons for reversing the judgment. Therefore, without unduly lengthening this statement, we merely call attention to the statement of facts in the opinion.

REPLY TO REASONS FOR GRANTING THE WRIT

A. THE NATURE OF CROSS-APPEALS

The Respondent contends that the decision of this Court is not in conflict with decisions of other circuits nor of this Court. It must be remembered that the reclamation petition filed in this matter asked for judgment against the Respondent in the sum of $36,000.00. The trial court found the issues in favor of Petitioner and allowed the sum of $27,400.00. The affidavit of the Bankrupt, which was stricken from the record by the order of the trial court, said, in effect, that the Bankrupt had turned over to the Respondent the sum of $36,000.00. Therefore, to allow Petitioner to urge without a cross-appeal that the Circuit Court of Appeals should take into consideration said affidavit, would be an effort on the part of the Petitioner to enlarge his rights and lessen the rights of Respondent.

This being a bankruptcy matter, equitable principles apply.

The first proposition relied upon by Petitioner is to the effect that the Petitioner was barred under the circumstances from taking any cross-appeal from the decision of the District Court. We believe that the following cases cited by the Petitioner do not sustain this proposition.

It would appear that Petitioner has erroneously cited the case of *Harding v. Federal National Bank*, 31 F. 2d 914 (1st Cir. 1929), as we believe that it sustains our position. In the first place, the Circuit Court of Appeals said that it found no merit in the plaintiff's cross-assignment of errors. Second, that "the decree appealed from was in his favor and granted him all the relief he sought. His

cross-appeal was therefore improperly taken (citations omitted) and, such being the case, it was not open to him to assign or argue cross-errors."

The case of *In re Schwartz*, 89 F. 2d ed. 172 (2nd Cir. 1937) does not support the position of Petitioner. The appellee received all of the relief which he had sought in the lower court and therefore, his cross-appeal was dismissed.

In the case of *Lanova Corp. v. National Supply Co.*, 116 F. 2d 235 (3rd Cir. 1940) the defendant had judgment entered in its favor on all matters in dispute and the Court properly held that it could not have appealed from the decree given in its favor.

In the case of *United Engineering and Foundry Co. v. Cold Metal Process Co.*, 68 F. 2d 564 (3rd Cir. 1934), cert den. 291 U.S. 675, on the motion of defendant the Court dismissed plaintiff's bill of complaint but because of one finding in the findings of fact the defendant appealed and the Court dismissed his appeal, which, certainly, is not in conflict and has no bearing on the instant case.

In the case of *Aberly v. Craven County*, 70 F. 2d 52 (4th Cir. 1934), the appeal of two of the defendants was dismissed because the decree was manifestly in their favor and the court said that they could not appeal from a decree altogether in their favor.

In the case of *Ottenheimer Bros. v. Libuwitz*, 74 F. 2d 858 (4th Cir., 1935), cert. den. 296 U.S. 582, the Court said: (p. 863)

> "It sometimes appears that when a party has a decree in his favor, but not to the extent prayed for, the decree becomes binding upon him, in so far as it is unfavorable, unless he takes an appeal. In the pending case, however, the defendant was awarded all the relief to which he was entitled, namely, a

dismissal of the plaintiffs' bill, and he was therefore in no position to appeal."

In *Mach v. Abbott Co.*, 136 F. 2d 7 (8th Cir., 1943), cert. den. 320 U.S. 773, the court held that the debtor could not appeal because he had secured by a judgment all the relief which he sought.

In the case of *United States v. Adamant Co.*, 197 F. 2d 1 (9th Cir., 1952), cert. den. 344 U.S. 903 (1952), there is merely the statement that an appeal lies from a judgment, and not from findings, and that in order that a judgment be appealable at the behest of the party the party must be aggrieved by it.

In the case of *Corning v. Troy Iron & Nail Factory*, 56 U.S. 451, 14 L. Ed. 768 (1853) the court said in effect that a court may decree in favor of a complainant but not to the extent prayed for in his bill and he may have just cause of appeal on that account, but where the respondent prayed that the bill be dismissed and, having won such a decree, he cannot have a more favorable one. Therefore, he is not aggrieved by the final decree and cannot appeal.

This case is authority for the proposition that the Petitioner in the instant case was in a position to file a cross-appeal because he did not get all of the relief prayed for in his petition, which we shall discuss later.

In the case of *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151 (1934) the United States Supreme Court dismissed the appeal of the defendant, saying that it was successful in the District Court and has no right of appeal from the decree in its favor.

In the case of *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1938) the Circuit Court of Appeals dismissed the appeal on the ground that petitioners had

been awarded all of the relief to which they were entitled, notwithstanding an adjudication of part of their claim. The United States Supreme Court granted certiorari, saying that:

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree. But where the decree in itself purports to adjudge the validity of claim 1, and even though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated."

Thus, the Supreme Court ordered the Circuit Court of Appeals to consider the appeal on that portion of the decree. We believe that this case is in support of our contention that where a judgment or decree grants only a portion of the relief sought, the other party is under a duty to cross-appeal. In this case the United States Supreme Court definitely did not hold that the defendant was barred from taking a cross-appeal, being the proposition for which this case is cited, but held just to the contrary.

Likewise, the case of *Commissioner of Internal Revenue v. Kelly's Estate*, 84 F. 2d 958 (7th Cir., 1936), cert. den. 299 U.S. 603, cited by Petitioner, being the same Circuit Court of Appeals which decided the instant case, holds that the respondent could not prosecute a cross-appeal because he had received by virtue of the Board's decision all of the relief for which he asked.

We have limited the foregoing to the one proposition that there is absolutely no conflict in either the Supreme Court opinions nor any of the Circuit Courts of Appeal on the proposition that a party is barred from taking any appeal or cross-appeal under circumstances where the decree or judgment has given him all of the relief for which he

prayed. These cases, cited by Petitioner, are not applicable to the instant situation because he claimed $36,000.00 and the trial court allowed him only $27,400.00.

There is no conflict in the decisions of the Circuit Courts of Appeal on this proposition. It is obvious from a reading of the Court's opinion in the instant case that the Court did not state nor did it hold that the appellee was barred from taking any cross-appeal.

The second proposition urged by the Petitioner, being based upon the erroneous assumption that he had no standing to cross-appeal, says that he had a right to urge, in the Court of Appeals, any matter overlooked or ignored by the trial court.

It is significant to note that in the Court's opinion, the Court refers to the fact that the Petitioner was trying to recover $36,000.00, as the Court said:

> "Thus, argues the petitioner, he is entitled to recover the amount of $36,000.00 from the assets in the hands of the trustee."

It is noted that the Court examined the affidavit of the bankrupt, as stated in its opinion, to the effect that he had turned $36,000.00 over to the Trustee, but then says that the Court may not consider the affidavit as evidence because no cross-appeal was taken by the Petitioner. It is therefore obvious that if the Court had considered the claim for $36,000.00 based upon the affidavit, it would have been an attempt by the Petitioner to enlarge his rights.

In the case of *United States v. American Railway Express Co.*, 265 U.S. 425 (1924), Justice Brandeis very plainly states the proposition, with which we do not disagree, that an appellee may urge upon the Circuit Court of Appeals, without taking a cross-appeal, any matters appearing in

the record which were overlooked or ignored by the court. However, Justice Brandeis goes on to say:

> "In other words, the appellee may not attack the decree with a view either to enlarge his own rights thereunder or of lessening the rights of his adversary whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."

The case of *Langnes v. Green*, 282 U.S. 531 (1931), cited by Petitioner, is not in point because it deals with admiralty law and under previous holdings in admiralty an appeal constitutes a trial de novo. In considering the applicable rule on a petition for certiorari where no cross-appeal was filed, the Court distinguished three cases where this Court had refused to consider rulings of the lower court where no cross-appeal was filed. This Court went on to say:

> "These decisions simply announced a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although he has not applied for certiorari; if the court deems there is good reason to do so."

It is significant to note that Finding of Fact No. 4 (R. 166) finds that the bankrupt delivered over to the Trustee in Bankruptcy the sum of $27,400.00. The Court then, in its Conclusions of Law (R. 167) strikes the affidavit of the Bankrupt. This is particularly significant in view of the fact that Petitioner has cited the case of *Morley Constr. Co. v. Maryland C. Co.*, 300 U.S. 185 (1937). In that case the Supreme Court granted certiorari for the particular purpose of fixing the measure of relief, if any, available to a non-appealing suitor. After laying down the general rule that an appellee in the absence of a cross-appeal may

urge matters ignored by the court, this Court said: (P. 191.)

> "Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment."

Without further unduly lengthening this reply, it is apparent from an examination of the authorities cited by the Petitioner and from the facts in the instant case:

1. That the relief prayed for by the Petitioner in the amount of $36,000.00 was not allowed by the District Court, but he was allowed only $27,400.00.

2. That his urging that the Circuit Court of Appeals consider the ruling of the trial court on the admissibility of the affidavit of the Bankrupt, without taking a cross-appeal, which affidavit alleged that the Bankrupt had turned over to the Trustee the sum of $36,000.00, was an effort by appellee to enlarge his rights and to ask the Circuit Court of Appeals to change Finding of Fact No. 4 as found by the trial court.

3. That under the holdings of this Court the Circuit Court of Appeals is not bound as a matter of right to consider alleged errors in the absence of a cross-appeal but has the power to do so if it sees fit, provided the same does not enlarge the rights of the appellee. The Court in the instant case did not see any good reason for going into the admissibility of the affidavit.

* * * * *

There is a more potent reason why the Court could very reasonably have refused to consider the affidavit, because

it very plainly was not admissible. We know of no case holding that an ex parte affidavit given by a bankrupt after title has passed and where the bankrupt is deceased is admissible. However, there is considerable authority to the contrary. *International Refugee Association v. Maryland Drydock Co.*, 179 Fed. 2d 284; *Stoehr v. Miller*, 296 Fed. 414; *Columbia Casualty Co. v. Thomas*, 100 Fed. 2d 151; *Stevens v. Howells Sales Co.*, 16 Fed. 2d 805; *Vendetti v. U.S.*, 45 Fed. 2d 543; *United States Fidelity & G. Co. v. Commercial Nat. Bank*, 55 Fed. 2d 564; *Pandolfo v. U.S.*, 286 Fed. 8, cert. den. 261 U.S. 621; *Karpathiou v. Schlotfeldt*, 106 Fed. 2d 928; *Brenneman v. Dillon*, 129 N.E. 564, 296 Ill. 140; *Independent Packing Co. v. Burns*, 168 Ill. App. 482; *6 American Jurisprudence*, page 1265, Section 1192; 53 ALR 650; *20 American Jurisprudence*, page 518, Section 604; *M'Iver v. Kyger*, 3 Wheat. U.S. 53; *Whitmore v. Murdock*, 29 Fed. Cases No. 17,509; *In Re Haynsworth*, 34 Fed. 2d 334; *Myers v. Kinzie*, 26 Ill. 36.

Thus, since the affidavit was not admissible in the first instance, nothing could have been gained by the Court giving consideration to it. Petitioners have cited no authority to the effect that the Court committed any error because the affidavit was admissible. Even assuming, for the sake of argument, which we deny, that the Court was under a duty to consider the ruling of the trial court and pass upon it with regard to the affidavit, it would seem that same falls into the category of harmless error where it would not in any way change the outcome of the litigation.

B. TRUSTEE'S DUTY UNDER A TURN-OVER ORDER

Under this proposition Petitioner cites the case of *Zartman v. First Natl. Bank*, 216 U.S. 134 (1910), which is not applicable to the instant case because in that case the court

merely held that a contract could be reformed where there had been a mutual mistake in preparing it. The bankrupt had owned the property prior to the bankruptcy and the trustee merely took title subject to the same equities as the bankrupt had. No one can dispute that proposition.

Petitioner also cites the case of *Watchmaker v. Barnes*, 259 Fed. 783 (1st Cir. 1919), where the Court charged the defendants with reasonable diligence to an inquiry concerning the forgeries committed by the bankrupt. The court sustained a judgment against the defendants and in favor of the trustee.

* * * * *

In the instant case the Court pointed out in its opinion (App. 4a):

> "But petitioner's proof that he had been so defrauded by Knetzer was not enough to establish the preference he sought over the other creditors. Most of the claimants in this bankruptcy matter had also been defrauded by Knetzer's representations that he would sell and deliver to them automobiles and tractors which Knetzer knew he could not deliver. But by these representations Knetzer induced them to make large deposits on the purchase price of automobiles and tractors which they ordered. Jaffke himself had been so defrauded by Knetzer to the extent of $11,300.00, for which Jaffke's attorneys filed for him a general claim with the trustee in bankruptcy."

Petitioner admitted that prior to the time he ever gave any money to the bankrupt he had received a letter from the Trustee which showed claims in the amount of $3,844,000.00, and that he knew that the Bankrupt was under an order to turn over $250,000.00 to the Trustee. In fact, he admitted giving to the Bankrupt the sum of $3,800.00 to be paid, so he was told, on the turn-over order to the Trustee.

It was quite obvious that a bankrupt who had handled millions of dollars should have had funds on hand at the time of bankruptcy. The Bankrupt did not appeal the turn-over order of $250,000.00. Surely, if he had not had the money at that time, he would have appealed that order. No one can now make a collateral attack upon that order. It is ridiculous to say that when the Bankrupt brought cash to the Trustee to be applied on the turn-over order, that the Trustee should make a search to determine the source of the funds. It is significant to note that the Petitioner in the instant case testified as a witness for the Bankrupt in a trial in which the Bankrupt was convicted in the United States District Court for concealment of assets, some three years after Petitioner claims that he gave the money to the Bankrupt. (R. 122-123.)

We believe the Circuit Court of Appeals correctly decided this issue, which is certainly not in conflict with any other opinions of this Court or any Circuit Courts of Appeal.

The case of *Maggio v. Zeitz*, 333 U.S. 56 (1948), cited by Petitioner, is not authority in this connection, because in that case, upon an appeal by the bankrupt, this Court properly held that a bankrupt could no longer be punished where it was obvious that he did not have the power to comply with the turn-over order.

In the instant case the Bankrupt was never purged of his contempt nor did he resort to appeals to this Court to relieve him of the payment of the $250,000.00. The Trustee had a perfect right to assume that he was still concealing that amount of money, and had a perfect right to collect it.

Petitioner's statement that the burden was on the Trustee to show the source of funds, rather than upon the

Petitioner to establish by clear and convincing evidence that the money which he gave to the Bankrupt came into the hands of the Trustee is certainly not the law. All of the authority on this subject is to the contrary. *Remington on Bankruptcy,* 5th Ed. 1953, Sec. 2480, Vol. 5A; *Schuyler v. Littlefield,* 232 U.S. 707, p. 713; *John Deere Plow Co. v. McDavid,* CCA 8th, 1905, 137 Fed. 802; *In Re Harigan Supply Co.,* CCA 8th, 1924, 2 Fed. 2d 791, p. 792; *In Re A. D. Matthews & Sons,* CCA 2nd, 238 Fed. 785.

In fact, the opinion of the Court is the best answer to this matter of tracing, and, without re-printing the same, we call the Court's attention to the third paragraph of the Circuit Court of Appeals' opinion on page 6a of the Appendix.

CONCLUSION

Respondent respectfully submitts that the petition for certiorari should be denied.

Respectfully submitted,

G. W. Horsley
L. H. Lenz
408 East Adams Street
Springfield, Illinois
Attorneys for Respondent.

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NO. 60

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956

ROBERT W. JAFFKE, Petitioner

v.

WILLIAM C. DUNHAM, Trustee of the Estate of ROBERT L. KNETZER, Bankrupt, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

---

BRIEF FOR RESPONDENT

G. W. HORSLEY
and
L. H. LENZ
408 East Adams Street
Springfield, Illinois
Attorneys for Respondent

SCHNEPP & BARNES, PRINTERS, SPRINGFIELD, ILL.

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NO. 60

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956

ROBERT W. JAFFKE, Petitioner

v.

WILLIAM C. DUNHAM, Trustee of the Estate of ROBERT L. KNETZER, Bankrupt, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the U.S. Court of Appeals, at R. 185, does not reflect the original opinion of the Court issued on January 13, 1956, but represents the opinion as amended after the order of February 13, 1956. The last two paragraphs of the original opinion, as shown at page 7 of said original opinion, are as follows:

> "The judgment is Reversed and the cause remanded for further proceedings consistent with the views expressed in this opinion.
>
> "Schnackenberg, Circuit Judge, concurring. I concur in the foregoing opinion, with the exception that I

believe the judgment should be reversed and there is no need for a remandment. Upon the hearing in the district court both parties had an opportunity to, and did, offer evidence which they considered relevant to all issues presented there and later in this court. There is no occasion now for a further hearing. Both sides have had their day in court."

Thereafter, the opinion was amended as printed at page 185, in accordance with the order of the Court dated February 13, 1956, shown at R. 202.

QUESTIONS PRESENTED

Can the Court of Appeals consider adverse rulings of the trial court where no cross-appeal is taken and where to do so would enlarge the rights of the party not cross-appealing?

Even if we assume for the sake of argument that the Circuit Court of Appeals erred in not considering the rejected evidence since no cross-appeal was taken, was it merely harmless error since the evidence was not admissible in the first place?

Is an ex parte affidavit admissible under the conditions as presented in the instant case?

In a reclamation proceeding is the burden of proof upon the Petitioner to prove a constructive trust by evidence which is so clear and convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion?

In a reclamation proceeding where property is in the possession of the Trustee is there a presumption of ownership in the Trustee, and is the burden upon the Petitioner to overcome such presumption by proof that is clear, convincing and unequivocal?

Was the Petitioner a competent witness in his own behalf under the evidence law of the State of Illinois?

STATEMENT

The Turn-Over Order

(For the sake of clarity we shall try to follow the sub-headings used by Petitioner in his brief.)

The turn-over order of Judge Charles G. Briggle, entered July 11, 1949 (R. 144) found that the Bankrupt had in his possession or under his control the sum of $250,000.00, which should be turned over to the estate as a part of the assets belonging to said bankrupt estate, at the time of the filing of the petition in bankruptcy herein. The Bankrupt was forthwith ordered to pay to the Trustee the sum of $250,000.00. It is significant to note that the turn-over order recites the taking of testimony before the entering of the same. There was no appeal taken from the turn-over order and it became final, nor was there any valid attempt on the part of the Bankrupt to be purged from contempt.

The statement by Petitioner that the Bankrupt was allowed freedom to obtain sufficient assets to comply with the turn-over order is not correct. The Circuit Court of Appeals stated in its opinion (R. 181) . . . "This permission was granted on Knetzer's promises that he could and would use his freedom to procure the required $250,000.00 and thereby purge himself of contempt."

The record (pp. 77-82) does show that the Bankrupt made payments at various times, but the statement of Petitioner that such payments were made "in effect buying further freedom from imprisonment" is not a proper conclusion to be drawn from such evidence.

The time element during which the Petitioner claims to have advanced money to the Bankrupt runs from December 7, 1950 to October 27, 1951, during which time the Peti-

tioner claims he advanced to Knetzer the sum of $47,980.00, all as is more fully shown by the chart set forth in the Argument. The testimony of Ralph Riley was that he had advanced $32,389.00 to Knetzer during the period from June 28, 1950 to September 19, 1950. (R. 140-3.) Clint Petty testified that he advanced to Knetzer the sum of $44,000.00 during the period from April 14, 1951 to June of 1951, (R. 138-140) and it was stipulated that Gerald Sammons advanced to Knetzer, between November 1, 1951 and February 1, 1952, the sum of $101,550.00. Saul Cohn testified that he was an attorney, but he was never asked whom he represented, and that during the period from April 14, 1951 to November, 1951 he paid $70,000 to the Trustee, some of which he received from Robert Knetzer and some from other people. More from Knetzer than anyone else, and that he did not know where Knetzer got the money. (R. 134-135.)

Fraud on Petitioner?

On page 5 the statement by Petitioner, that the Bankrupt stated that he had agreed to make the payment to the Court under duress, is not contained in the record. Such evidence was given by petitioner, and upon objection this statement was stricken by the trial court. The record does not disclose that the Bankrupt ever signed any statement or any agreement in connection with the turn-over order. The testimony of the Petitioner was that the Bankrupt informed him that he had to pay $5,000.00 into court at once, rather than that he needed $3,800.00 additional money to pay into court. (R. 53.)

Petitioner makes the flat statement, on page 5, to the effect that the Bankrupt was never in custody. However, he testified that he had read in the newspaper that the Bankrupt was in the custody of a Marshal and that the

Bankrupt replied that it was all paper talk and was not true. Petitioner offered his Exhibit 29, which was ordered stricken by the trial court, but is one of the matters which has been urged by the petitioner, and used by him in his brief, and if this Court sees fit to consider said Exhibit 29, attention is called to the Record at page 205 where the Honorable Charles G. Briggle pointed out to the Bankrupt that he would have to reimburse the United States Treasury for the salary of the U. S. Marshal "while he has been engaged in taking you about from place to place, and Mr. Doyle has suggested that the figure would probably be $10,000.00." The Bankrupt agreed to that repayment.

The statement on page 5 that payments were made by Petitioner to the Bankrupt as further investments in the Bison Company is contrary to the exhibits offered by Petitioner and is more fully discussed in the Argument.

We believe that Petitioner has omitted the following facts which are material in connection with his contention.

Petitioner testified in substance that he was an insurance broker in St. Louis, Missouri; that he had handled loans daily and weekly since 1939 (R. 41); that he borrowed from individuals and built houses; that he was represented by a law firm that handled his title work and other legal matters (R. 115); that in June of 1947 he deposited $1,300.00 with Knetzer on an automobile; that in April of 1948 he made another deposit on an automobile; that in March of 1948 he deposited $3,000.00 on three tractors and in April of 1948 he deposited $7,000.00 on seven more tractors. He expected to sell these tractors and make a profit on them. In October of 1948 he learned of the bankruptcy and he employed attorneys to try to collect the money for him and they filed a claim in bankruptcy court for $11,300.00. (R. 44.)

Petitioner admitted that in January, 1950 he received Respondent's Exhibit 1 (R. 161) through the mail, which in effect told him that the estate was hopelessly insolvent, that the total claims filed amounted to nearly $4,000,000.00, consisting of 535 claims, in addition to a Federal Tax claim for $2,226,000.00, and that said Exhibit further informed him that the Bankrupt was under a turn-over order to pay to the Trustee the sum of $250,000.00 and that only a small portion of it had been paid. (R. 117.)

On December 6, 1950, Petitioner contended that the Bankrupt called him on the telephone and he met him at the Sheraton Hotel in St. Louis. He said that the Bankrupt told him that he had formed a corporation known as the Bison Mining and Development Company, and that he himself was just the manager but he had an influential man who was arranging a loan for the corporation in order to build houses at an Air Force Base near Great Falls, Montana. He further said the Bankrupt told him that he had considerable expense and couldn't operate sooner because of a huge government tax lien against him. Petitioner noticed that he wasn't in the custody of the Marshal, and asked him about it, and the Bankrupt said that it was just paper talk and that all he had to do was just to report every few weeks. Petitioner met him the next morning, said he believed the representations and gave the Bankrupt $2,300.00. That was on December 7, 1950. He again gave money to the Bankrupt a second time on that same afternoon and Petitioner said:

> "I took the first payment with me and went up to an office of a man named John Snyder. He represented Mr. Snyder as being his accountant and tax man and also interested in this particular deal. Knetzer himself went into the office of Mr. Snyder, and I stayed outside in the waiting room, and after some time, sup-

posedly twenty minutes or so, he came back out and we went downstairs and he said that Snyder had given him some bad news. I said, 'Now what?' He said the court was requesting a payment of $5000.00 which would have to be paid at once. * * * * * it was a payment to be made to the court on his bankruptcy account of some $250,000.00 and which he had agreed to turn into court." (R. 51-53.)

The Petitioner admitted that he had discussed with the Bankrupt his agreement to pay the $250,000.00 turn-over order to the Trustee. The second payment on that date was $3,800.00, making a total of $6,100.00 on December 7. On December 10, 11 and 12 he met the Bankrupt at the Airport in the company of Ralph Riley, whose name the Bankrupt had previously given to him as a member of the corporation. (R. 57.)

Petitioner said that the Bankrupt needed additional assets to show in the corporation to help get the loan approved and wanted $12,500.00. (R. 59.) Petitioner testified that he borrowed that sum and turned it over to the Bankrupt. On December 17, 1950 he again met the Bankrupt, who said he needed $7,500.00 in connection with the building of these houses. Petitioner then conferred with Ralph Riley, who informed him that he had money in the deal, too. He testified he then borrowed the money, turning it over to the Bankrupt on December 18th, and again on December 22nd gave him $9000.00. On January 3rd he advanced $6000.00 to the Bankrupt, because the Bankrupt needed more money on the transaction and there was again additional money needed in the assets of the corporation for the approval of the loan. On January 8th the Bankrupt said he needed additional money for attorneys' fees and he gave him $1000.00. On March 14, 1951 he gave the Bankrupt $520.00 and $260.00 on May 21, 1951.

He did not see the Bankrupt again until August, 1951, when the Bankrupt was in a hospital because of an automobile accident and he advanced him $300.00 for phone calls. In October of 1951 he advanced $4800.00. (R. 113.)

Petitioner put in evidence a note payable to him signed by the Bankrupt, dated December 6, 1950, payable to R. W. Jaffke, in the amount of $7000.00, due December 6, 1951, with interest at 8% (R. 160), but he testified that the note was actually given in March of 1951, a few days after the Bankrupt got out of jail, since the Bankrupt had gone to jail in January a few days after he had secured $7,000.00 from him (R. 114). Petitioner also put into evidence his Exhibit 28, being a receipt dated December 22, 1950, showing that Knetzer received from Petitioner the sum of $35,100.00. Said receipt recited, "Date Dec. 22, 1950, Received of Robert W. Jaffke Thirty-five thousand one hundred dollars ($35,100.00), money loaned to me in cash, to be accounted for by December 28, 1950" signed by Robert L. Knetzer. (R. 160.)

Petitioner admitted that he had title to the Bankrupt's 1951 Cadillac as security for the $4800.00 paid in October, 1951, which he surrendered upon payment of $2800.00. (R. 127.)

Petitioner admitted that he had been in the real estate and investment business since 1939, had built houses; that he never looked at the books and records of the corporation; that he knew one of the incorporators was Ed Kane of Edwardsville, yet he never talked to him; that he knew the Bankrupt was not a member because of his bankrupt condition and that anything that he was connected with would stand too much investigation about concealing assets. That conversation took place on December 6, 1950, before he had given him any money. Petitioner testified that he

did not intend to purchase any stock in the corporation, but only intended to invest money in the project with the hope of making a 50% profit like he did in another deal. (R. 117.)

Petitioner admitted that he knew that the Bankrupt was under an order to turn over to the Trustee the sum of $250,000.00. The Petitioner had met Riley in March of 1951 and knew that Riley was very much disgusted with the dealings he had had with the Bankrupt. He knew that Riley was having trouble in March of 1951. Petitioner stated that $3800.00 of the first $6100.00 which he gave to the Bankrupt on December 8, 1950 was for the purpose of paying on the turn-over order. He admitted that when the Respondent took his deposition prior to trial, in response to the question, "How was that $6,100.00 to be repaid to you?" and he answered, "He was to get it back to me when he got it from another individual later." Petitioner admitted that he had read in the newspapers of the Bankrupt's schemes of buying cars to re-sell and paying $1000.00 more for the cars than what he got for them, that he did not ask the Bankrupt how much money he had paid on the turn-over order when he talked to him.

Petitioner admitted seeing Clint Petty hand a sack to the Bankrupt on May 28, 1951, with a large amount of money in it.

Petitioner expressly stated that the $4800.00 given to the Bankrupt in October of 1951 was on the basis of security of an automobile as, "I had realized this man could not be trusted," and he later gave the title of the car back to the Bankrupt's wife and released it upon the payment to him of $2800.00. (R. 127.)

Petitioner testified that as far as he knew, he did not know what was done with the money that he gave to the

Bankrupt and he did not know whether there was some oil or timber properties presently held by the Bankrupt.

The Petitioner put on as his witness Attorney Saul E. Cohn who testified that from April 14, 1951 to November, 1951 he paid to the Trustee approximately $70,000. Some of the money came from Knetzer and some from other people and he did not know where Knetzer obtained the money. He only saw Petitioner Jaffke one time, but he never knew his name until today, that one time when Mr. Knetzer was in his office, Mr. Jaffke was there with him, but he was not present at any time when Knetzer turned money over to him.

In the month of February, 1953 the Petitioner testified as a witness for the Bankrupt while he was on trial for concealing assets, which resulted in his conviction, and he was asked by the attorney for the Bankrupt, "Since October 5, 1948, have you loaned any money to Robert Knetzer?" and Petitioner answered, "Yes, Mr. Knetzer received the sum of $47,980.00 from me." (R. 123.)

He did not file any subpoena or claim a witness fee or mileage. (R. 122.) He brought the Bankrupt's wife up to the jail to visit him every few days and during the trial which lasted about 3 weeks in February, 1953 he drove the Bankrupt back and forth from St. Louis to Springfield every day, and claimed that the Bankrupt still owed him for those expenses. (R. 132.)

Bankrupt's Admissions

Petitioner's statement that he first learned in the Spring of 1952 that the Bankrupt had not used the money for the Bison Mining and Development Company is not correct. His own testimony showed that he knew the first money was to be used on the turn-over order and he gave the

Bankrupt money while he was in the hospital for calls and expenses and he heard him make those phone calls. (R. 124.) He loaned the Bankrupt $4,800.00 after he claimed he realized the Bankrupt could not be trusted, took a mortgage on the Bankrupt's cars and claimed that money was to be used for a Christmas tree project. (R. 127-9.)

During the period of his dealings with the Bankrupt, the Bankrupt was working on the corporation deal but he did not know how much money the Bankrupt had put into the corporation deal and had no personal knowledge as to what had happened to the money. (R. 126.)

Petitioner's Exhibit 24 is the affidavit mentioned on page 6, which was stricken by the Court as not being admissible. Contrary to Petitioner's statement that R. W. Heintz was the Bankrupt's attorney, Heintz testified that he came to Springfield for the purpose of interviewing the Bankrupt, to determine whether his office would represent the Bankrupt. He went to Mr. William Giffin's office, who had represented the Bankrupt, and there met Mrs. Knetzer at that office. As he entered the jail to interview Knetzer the Petitioner handed him the affidavit which had already been prepared and he obtained the signature of Knetzer before a Notary Public. (R. 103-5.) Said Exhibit contains a recital that the Bankrupt "borrowed" the money from Petitioner. (R. 203.)

Petitioner's Suit

Petitioner's statement that the Respondent never had any evidence that payments were made from concealed assets, on page 7, does not quite reflect the true situation. Respondent was asked as to whether or not he referred these matters to the Federal Bureau of Investigation and the Court sustained an objection requiring him to tell of his activities in connection with the F. B. I. (R. 93.)

In response to the question as to whether or not he had any evidence that payments were from concealed assets the Respondent answered, "No, no absolute knowledge." (R. 94.) Petitioner's statement that Respondent knew that the Bankrupt was out of jail not in the custody of a Marshal is misleading. Respondent made a distinction between actual and technical confinement and that as far as he knew the Bankrupt came to his office alone and that he was not in actual custody so far as he knew.

It would take a volume of printing to show the inaccuracies contained in the third paragraph on page 7, but only a reading of pages 84, 90-91, 38-39 would show up these inaccuracies.

On page 8 Petitioner refers to his answer to the motion to modify the Court's opinion filed by the Petitioner in the Circuit Court of Appeals, which is not any part of the evidence in this case.

However, since Petitioner has brought up the matter, so that there will be no misunderstanding, we cannot help but refer to page 193 of the Record. Petitioner has attempted to make it appear that that was an official trustee's account, with the deductions of Petty's payments, etc., which is not at all correct. Likewise, his statement that Knetzer was confined in jail on January 16, 1951 and released on March 5, 1951 is not found at page 78 of the record nor is it anywhere in the record. An examination of the charts will refute Petitioner's claim, because the chart shows that Riley paid Knetzer $11,050.00 between June 28, 1950 and August 2, 1950, and yet Knetzer made 2 payments, to-wit, July 28, 1950, of $9,315.00, and August 2, 1950, of $8,000.00, making a total of $17,350.00 prior to the time it is contended that Riley gave him any more money. Therefore, it cannot be contended that this was

all Riley's money. Said chart further disregards the testimony of Attorney Saul Cohn; that only part of the money that he paid to the Trustee came from Knetzer, the rest of it came from other persons.

The Decision of the Court of Appeals

We do not believe that Petitioner's statement on page 9, that the Court of Appeals sustained the finding of the lower court that the Bankrupt had defrauded the Petitioner of $47,980.00 is a correct statement. The Court of Appeals, in its opinion, said:

> "But Petitioner's proof that he had been so defrauded by Knetzer was not enough to establish the preference he sought over the other creditors.
>
> "Most of the claimants in this bankruptcy matter had also been defrauded by Knetzer's representations that he would sell and deliver to them automobiles and tractors which Knetzer knew he could not deliver. But by these representations Knetzer induced them to make large deposits on the purchase price of automobiles and tractors which they ordered. Jaffke himself had been so defrauded by Knetzer to the extent of $11,300.00, for which Jaffke's attorneys filed for him a general claim with the trustee in bankruptcy.
>
> "But in the instant proceeding Jaffke claims that since Knetzer, after he had been adjudged a bankrupt, procured the amount of $47,980.00 from him by fraud and then paid $36,000.00 of that amount to the trustee, the money so paid did not become the property of the trustee because it was impressed with a trust in favor of the Petitioner. Thus, argues the Petitioner, he is entitled to recover the amount of $36,000.00 from the assets in the hands of the trustee.
>
> "To support his claim on this theory it was just as necessary for the Petitioner to prove that the $36,000.00 was paid (fol. 184) to and became a part of the funds in the hands of the trustee as it was to

prove that Knetzer had procured this money by fraud. This we think the Petitioner has failed to do. . . ." (R. 182-183.)

SUMMARY OF ARGUMENT

I.

Where an appeal is taken by the losing party, the victorious party may urge the reviewing court to consider matters erroneously decided or overlooked by the trial court without a cross-appeal, only if the victorious party received all that he was seeking in the trial court and if to do so will not enlarge his rights and diminish the rights of the appellant. In the instant case the Petitioner brought suit against the Respondent claiming $36,000.00, but the trial court in its findings of fact and conclusions of law found that he was only entitled to $27,400.00. Petitioner's theory of the suit is based upon a constructive trust because of fraud. He offered an affidavit of the Bankrupt to prove his claim for $36,000.00, which was stricken by the trial court and which showed upon its fact that it represented money "borrowed" from Petitioner. The Circuit Court of Appeals refused to consider the affidavit because no cross-appeal was taken. Therefore, to consider said affidavit would amount to Petitioner urging a new theory in the case and, if admissible, might entitle him to judgment for $36,000.00 rather than $27,400.00. If same were admissible it would require a change of a finding of fact by the trial court and would thus enlarge the rights of the Petitioner without a cross appeal, contrary to the applicable case law.

II.

Shortly after bankruptcy the District Court ordered the Bankrupt to turn over to his trustee the sum of $250,000.00, which the Court found the Bankrupt had

in his possession or under his control at the time of bankruptcy. The turn-over order was not appealed and the Bankrupt was never purged of contempt. The only proof of tracing which Petitioner offered, but which was excluded by the trial court, was an affidavit by the Bankrupt that he had borrowed $36,000.00 from the Petitioner, which he gave to his trustee to apply on the turn-over order. This affidavit was not admissible as an admission against interest, both under the case law of the State of Illinois and the decisions of this Court. Neither was it admissible as an *ex parte* affidavit for the same reasons, and more particularly, because the admissions of the Bankrupt could not be used to defeat the title of his trustee. Since the Circuit Court of Appeals had held that the Petitioner had not proven such fraud as to impress the funds with a constructive trust, which would give him a preference over other creditors, and since he had not proven any tracing of the funds to the Trustee, the decision of the Circuit Court of Appeals was correct in entering judgment for the Respondent.

III.

A trustee in bankruptcy does not have a duty to investigate the source of payments made to him in compliance with a turn-over order. The Trustee had a duty imposed upon him by the Court order, which he fulfilled by having the Bankrupt cited for contempt of court and imprisoned. The fact that the Bankrupt was released from jail by order of the Court, so that he could comply with the turn-over order, does not require the Trustee to investigate the source of such payments to comply with said order.

IV.

The instant case is not similar to cases where a bankrupt operates a business under a re-organization or as a debtor

in possession or where a trustee operates the business and commingles tax moneys with bankrupt assets, where such tax moneys are impressed with a trust by virtue of statute.

Where other persons loaned or gave money to the Bankrupt for the purpose of paying on the turn-over order, such persons cannot complain. Where the Bankrupt borrowed money from other persons and the Bankrupt used some of these funds in lieu of his concealed assets to make payment on the turn-over order, such funds are not impressed with a trust. Where the Bankrupt borrowed more than $225,000.00, but only paid $79,000.00 to his trustee on the turn-over order, without any proof of tracing of the funds, Petitioner cannot recover.

V.

In a reclamation proceedings the burden is upon a petitioner and he can only establish his case by evidence that is clear, convincing and unequivocal, to overcome the presumption of ownership by the trustee. This burden never shifts to the trustee, and where the facts indicate that the Petitioner has failed in his proof of tracing, the Respondent must prevail.

VI.

The evidence on the part of a petitioner in a reclamation proceeding, seeking to establish a constructive trust, must be of such character that it is clear, convincing, unequivocal and unmistakable and can only lead to but one conclusion. The Circuit Court of Appeals found that the Petitioner had not so proven his case and under the applicable law the facts show that he has not established a constructive trust.

Likewise, the Petitioner must show diligence upon his part and act as a prudent man would act under the circumstances. The evidence in this case indicates that the

Petitioner did not so act; that he had knowledge of fraudulent activities on the part of the Bankrupt prior to bankruptcy; that he had knowledge of the turn-over order, giving money to the Bankrupt to apply on the turn-over order; that he was in league with the Bankrupt in *sub rosa* business activities, helping the Bankrupt to conceal such activities from his trustee, attempting to invest money in such activities with the hope of making a large profit and therefore, cannot recover.

VII.

The Bankrupt was dead at the time of the hearing in this matter, leaving surviving heirs and the Petitioner was not a competent witness in his own behalf by virtue of the Evidence Act of the State of Illinois. Since the Bankruptcy Court is bound by the rules of evidence of Illinois, the trial court erred in allowing the Petitioner to testify in his own behalf.

ARGUMENT

(In replying, we shall first try to refer to the headings as used by Petitioner.)

I. The Court of Appeals did not erroneously refuse to consider Appellee's contentions in support of the verdict of the Trial Court.

The opinion of the Circuit Court of Appeals is a somewhat unusual opinion in that it does not rely upon any case law, there being no cases cited therein, but is based upon an analysis of the facts and the inferences to be drawn from those facts.

To begin with, the Court found from the facts that the Petitioner had not proven such fraud which would give him a preference over the other creditors. The Court

then found specifically that the Petitioner had not proven any tracing of funds, which he must do just as much as he must prove a fraud which would raise a constructive trust. It is also significant to note that Judge Schnackenberg in the original opinion, concurred specifically in the opinion, but added:

> "Upon the hearing in the District Court both parties had an opportunity to, and did, offer evidence which they considered relevant to all issues presented there and later in this Court. There is no occasion now for a further hearing. Both sides have had their day in court."

After that opinion, in response to Respondent's motion to modify the opinion, the Petitioner filed a long answer which was more or less in the nature of a brief, urging upon the Court the proposition that it should consider the affidavit and citing authorities that the Court could consider the same without the necessity of a cross-appeal. (R. 190.) Thereafter, the Court modified its opinion and struck from it the remandment for further proceedings, consistent with the views expressed in the opinion, and entered judgment for the Respondent.

It is thus obvious that the Court did consider fully the theories advanced by the Petitioner, although it is true that it did not correct that part of the opinion which mentioned that no cross-appeal had been taken. It is also obvious from the opinion that the Court did consider, not only the affidavit, but the transcript of record which was likewise stricken by the trial court, as it is mentioned in detail in the opinion.

However, we do not believe that too much emphasis should be placed upon this particular point in view of our belief that the affidavit was not admissible in the first place and further, in view of the fact that the Petitioner

has wholly failed to prove a constructive trust, particularly in view of the existence of the turn-over order, his knowledge of the same, his alleged participation in the payments upon the order, and his intimacies with the Bankrupt right up until after the Bankrupt had been convicted of concealing the very assets that the Court had ordered the Bankrupt to turn over. Even if, for the sake of argument, it were conceded that the Circuit Court of Appeals did not use correct language in saying that it could not consider the affidavit because no cross-appeal were taken, it would merely be harmless error because of the inadmissibility of the affidavit and the total failure by the Petitioner to sustain his burden of proof on all of the elements which are necessary in a reclamation petition such as is here under consideration.

We do not disagree with the general principles stated by Petitioner to the effect that an appellee may urge upon the Court of Appeals, without a cross-appeal, any adverse ruling on evidence or matters overlooked by the Court in reaching its ultimate conclusion, in order to sustain the position that the judgment should be affirmed. However, the rule is firmly established that it is discretionary with the reviewing court as to what matters it may care to consider in reaching the ultimate conclusion and it is even more firmly established that an appellee cannot urge upon the reviewing court, without a cross-appeal, any adverse ruling of the trial court which would enlarge his rights or diminish the appellant's rights.

There are many cases involving this latter proposition which turn on the question of whether or not such consideration would or would not enlarge the rights of the appellee.

To begin with, the Petitioner has tried to establish his

then found specifically that the Petitioner had not proven any tracing of funds, which he must do just as much as he must prove a fraud which would raise a constructive trust. It is also significant to note that Judge Schnackenberg in the original opinion, concurred specifically in the opinion, but added:

> "Upon the hearing in the District Court both parties had an opportunity to, and did, offer evidence which they considered relevant to all issues presented there and later in this Court. There is no occasion now for a further hearing. Both sides have had their day in court."

After that opinion, in response to Respondent's motion to modify the opinion, the Petitioner filed a long answer which was more or less in the nature of a brief, urging upon the Court the proposition that it should consider the affidavit and citing authorities that the Court could consider the same without the necessity of a cross-appeal. (R. 190.) Thereafter, the Court modified its opinion and struck from it the remandment for further proceedings, consistent with the views expressed in the opinion, and entered judgment for the Respondent.

It is thus obvious that the Court did consider fully the theories advanced by the Petitioner, although it is true that it did not correct that part of the opinion which mentioned that no cross-appeal had been taken. It is also obvious from the opinion that the Court did consider, not only the affidavit, but the transcript of record which was likewise stricken by the trial court, as it is mentioned in detail in the opinion.

However, we do not believe that too much emphasis should be placed upon this particular point in view of our belief that the affidavit was not admissible in the first place and further, in view of the fact that the Petitioner

has wholly failed to prove a constructive trust, particularly in view of the existence of the turn-over order, his knowledge of the same, his alleged participation in the payments upon the order, and his intimacies with the Bankrupt right up until after the Bankrupt had been convicted of concealing the very assets that the Court had ordered the Bankrupt to turn over. Even if, for the sake of argument, it were conceded that the Circuit Court of Appeals did not use correct language in saying that it could not consider the affidavit because no cross-appeal were taken, it would merely be harmless error because of the inadmissibility of the affidavit and the total failure by the Petitioner to sustain his burden of proof on all of the elements which are necessary in a reclamation petition such as is here under consideration.

We do not disagree with the general principles stated by Petitioner to the effect that an appellee may urge upon the Court of Appeals, without a cross-appeal, any adverse ruling on evidence or matters overlooked by the Court in reaching its ultimate conclusion, in order to sustain the position that the judgment should be affirmed. However, the rule is firmly established that it is discretionary with the reviewing court as to what matters it may care to consider in reaching the ultimate conclusion and it is even more firmly established that an appellee cannot urge upon the reviewing court, without a cross-appeal, any adverse ruling of the trial court which would enlarge his rights or diminish the appellant's rights.

There are many cases involving this latter proposition which turn on the question of whether or not such consideration would or would not enlarge the rights of the appellee.

To begin with, the Petitioner has tried to establish his

case on the theory of a constructive trust as firmly set forth in the opinion of the Circuit Court of Appeals. To back up his contention, his testimony is all based upon the theory that he invested money in corporate activities with the Bankrupt, based upon fraudulent statements of the Bankrupt. Of course, this oral testimony of the Petitioner is contrary to the very terms of the written instruments which he introduced, particularly Petitioner's Exhibit 27 (R. 160), being a note dated December 6, 1950, for $7,000.00, signed by the Bankrupt payable to the Petitioner, with interest at 8%, payable December 6, 1951, whereas the Petitioner testified that he had advanced only $6,100.00 to the Bankrupt as an investment in a corporation deal and he expected to make a profit based upon a percentage with what other individuals had put into the operation. (R. 118.) He testified that he advanced $12,500.00 on December 13th, $7,500.00 on December 18th, and $9,000.00 on December 21, 1950, or a total of $29,000.00, all of which was as an investment in the so-called building project upon which he expected to make a percentage of the profits. Yet, he introduces a receipt dated December 22, 1952, being Petitioner's Exhibit 28, (R. 160) signed by the Bankrupt, which recites that he had received of Robert W. Jaffke $35,100.00, "money loaned to me in cash, to be accounted for by December 28, 1950." Thus, the written evidence submitted by the Petitioner showed on its face that it was a loan for a few days to the Bankrupt, to be repaid within 6 days thereafter, which, again, is inconsistent with his theory of a constructive trust and his oral testimony that the money was to be used in a building project.

As against this background, the Petitioner then contends that his Exhibit 24 (R. 203) should have been admitted into evidence, but said Exhibit shows on its face that

the Bankrupt "borrowed the sum," which, again, is inconsistent with Petitioner's theory of a constructive trust and contrary to the necessary requisites of the burden of proof which he must sustain.

The trial court found, without any explanation of mathematical deductions, etc., that the Bankrupt had defrauded the Petitioner of $27,400.00, which the Petitioner paid to the Bankrupt. The trial court rejected the affidavit, properly so, without giving any reason, but it was obvious that it was not admissible in the first place and secondly, that it was inconsistent with the Petitioner's theory of a constructive trust.

The Petitioner urged the Circuit Court of Appeals to accept this affidavit, without a cross-appeal, which, if the Court had accepted the affidavit, might have entitled the Petitioner to a judgment in the sum of $36,000.00 rather than $27,400.00, and upon a completely different theory than Petitioner had based his whole case.

Petitioner has cited the case of *Langnes* v. *Green*, 282 U.S. 531, 1931, which is not exactly in point because it deals with admiralty law, where on appeal there is a trial *de novo*. However, in that case this Court went on to say:

> "These decisions simply announced a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although he has not applied for certiorari; if the court deems there is good reason to do so."

It is significant to note that Finding of Fact No. 4 (R. 166) finds that the bankrupt delivered over to the Trustee in Bankruptcy the sum of $27,400.00. The Court then, in its Conclusions of Law (R. 167) strikes the affidavit of the Bankrupt. This is particularly significant in view of the

fact that Petitioner has cited the case of *Morley Constr. Co.* v. *Maryland C. Co.*, 300 U.S. 185 (1937). In that case the Supreme Court granted certiorari for the particular purpose of fixing the measure of relief, if any, available to a non-appealing suitor. After laying down the general rule that an appellee in the absence of a cross-appeal may urge matters ignored by the court, this Court said: (P. 191.)

> "Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment."

It would appear that Petitioner has erroneously cited the case of *Harding* v. *Federal National Bank*, 31 F. 2d 914 (1st Cir. 1929), as we believe that it sustains our position. In the first place, the Circuit Court of Appeals said that it found no merit in the plaintiff's cross-assignment of errors. Second, that "the decree appealed from was in his favor and granted him all the relief he sought. His cross-appeal was therefore improperly taken (citations omitted) and, such being the case, it was not open to him to assign or argue cross-errors."

The case of *In re Schwartz*, 89 F. 2d ed. 172 (2nd Cir. 1937) does not support the position of Petitioner. The appellee received all of the relief which he had sought in the lower court and therefore, his cross-appeal was dismissed.

In the case of *Lanova Corp.* v. *National Supply Co.*, 116 F. 2d 235 (3rd Cir. 1940) the defendant had judgment entered in its favor on all matters in dispute and the Court properly held that it could not have appealed from the decree given in its favor.

In the case of *United Engineering and Foundry Co.* v. *Cold Metal Process Co.*, 68 F. 2d 564 (3rd Cir. 1934), cert. den. 291 U.S. 675, on the motion of defendant the Court dismissed plaintiff's bill of complaint but because of one finding in the findings of fact the defendant appealed and the Court dismissed his appeal, which, certainly, is not in conflict and has no bearing on the instant case.

In the case of *Aberly* v. *Craven County*, 70 F. 2d 52 (4th Cir. 1934), the appeal of two of the defendants was dismissed because the decree was manifestly in their favor and the court said that they could not appeal from a decree altogether in their favor.

In the case of *Ottenheimer Bros.* v. *Libuwitz*, 74 F. 2d 858 (4th Cir., 1935), cert. den. 296 U.S. 582, the Court said: (p. 863)

> "It sometimes appears that when a party has a decree in his favor, but not to the extent prayed for, the decree becomes binding upon him, in so far as it is unfavorable, unless he takes an appeal. In the pending case, however, the defendant was awarded all the relief to which he was entitled, namely, a dismissal of the plaintiffs' bill, and he was therefore in no position to appeal."

In *Mach* v. *Abbott Co.*, 136 F. 2d 7 (8th Cir., 1943), cert. den. 320 U.S. 773, the court held that the debtor could not appeal because he had secured by a judgment all the relief which he sought.

In the case of *United States* v. *Adamant Co.*, 197 F. 2d 1 (9th Cir., 1952), cert. den. 344 U.S. 903 (1952), there is merely the statement that an appeal lies from a judgment, and not from findings, and that in order that a judgment be appealable at the behest of the party the party must be aggrieved by it.

In the case of *Corning* v. *Troy Iron & Nail Factory*, 56 U.S. 451, 14 L. Ed. 768 (1853) the court said in effect that a court may decree in favor of a complainant but not to the extent prayed for in his bill and he may have just cause of appeal on that account, but where the respondent prayed that the bill be dismissed and, having won such a decree, he cannot have a more favorable one. Therefore, he is not aggrieved by the final decree and cannot appeal.

This case is authority for the proposition that the Petitioner in the instant case was in a position to file a cross-appeal because he did not get all of the relief prayed for in his petition, which we shall discuss later.

In the case of *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151 (1934) the United States Supreme Court dismissed the appeal of the defendant, saying that it was successful in the District Court and has no right of appeal from the decree in its favor.

In the case of *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924), Justice Brandeis very plainly states the proposition, with which we do not disagree, that an appellee may urge upon the Circuit Court of Appeals, without taking a cross-appeal, any matters appearing in the record which were overlooked or ignored by the court. However, Justice Brandeis goes on to say:

> "In other words, the appellee may not attack the decree with a view either to enlarge his own rights thereunder or of lessening the rights of his adversary whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."

In the case of *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1938) the Circuit Court of Appeals dismissed the appeal on the ground that petitioners had

been awarded all of the relief to which they were entitled, notwithstanding an adjudication of part of their claim. The United States Supreme Court granted certiorari, saying that:

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree. But where the decree in itself purports to adjudge the validity of claim 1, and even though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated."

Thus, the Supreme Court ordered the Circuit Court of Appeals to consider the appeal on that portion of the decree. We believe that this case is in support of our contention that where a judgment or decree grants only a portion of the relief sought, the other party is under a duty to cross-appeal.

Therefore, it would appear that from all of the cases we have examined, if a petitioner secures only a portion of the relief which he has sought, then he definitely has a right to take a cross-appeal and has a duty to do so if he insists that the Court consider matters urged in the trial court but not accepted, which would in effect enlarge his rights.

Thus, it is apparent, even from the cases cited by the Petitioner, that the Petitioner could not urge upon the Circuit Court of Appeals the consideration of the affidavit because to do so the Court would have to change the finding of fact No. 4 of the trial court (R. 166) to the effect that the Bankrupt had delivered to the Trustee the sum of $27,400.00, and would thus be enlarging the rights of the Petitioner where no cross-appeal had been filed.

II. The judgment of the District Court should not be affirmed but the decision of the Circuit Court of Appeals should be affirmed.

The purported declaration against interest of the Bankrupt was not in fact a declaration against his interest and was not admissible against his Trustee. There can be no question but that a trustee in bankruptcy would have no right, title and interest in and to any funds or property acquired by a bankrupt after bankruptcy. However, this entire matter must be considered in the light of the turn-over order, which found that the Bankrupt, at the time of bankruptcy, had in his possession the sum of $250,000.00, which should be turned over to his Trustee. Thus, in effect, when this order became final, the Trustee held title to assets worth $250,000.00, which the Court said was in the possession or under the control of the Bankrupt. The Bankrupt never appealed this turn-over order nor did he purge himself of contempt, nor did he make any showing that he did not have the ability to comply with the turn-over order.

Petitioner makes the flat statement on page 20 that the affidavit, being Petitioner's Exhibit 24, was clearly admissible under the Illinois law. We disagree with this proposition. Petitioner has cited only one case to support his theory, being that of *Schell* v. *Weaver*, 225 Ill. 159, 80 N.E. 95. We do not disagree with the proposition of law as set forth in that case. The decedent had borrowed money and, prior to his death, admitted to a third person that he owed the money and was looking for the man from whom he borrowed the money, so that he could repay the loan together with interest. After a claim was filed against the decedent's estate for the money, the third party was allowed to testify as to the statement made by the decedent, which was received in evidence as an admission against his

interest in order to prove the claim against his estate. However, this case does not involve any affidavit which would be contrary to the interests of a trustee after title had passed.

In the case of *Cook* v. *Korshak*, 301 Ill. 603, 134 N.E. 49 (1922) the Supreme Court of the State of Illinois reversed a judgment by the purported owner of a ring against a pawn shop broker, where she had testified, as well as other witnesses, that her son admitted in the presence of the defendant, that he had stolen the ring and taken it to the pawn shop and sold it. The Illinois Supreme Court said, at page 51 N.E.:

> "This was hearsay evidence purely, and was not competent against the plaintiff in error over his objection. Wallace was not a witness on this trial. It is a familiar rule of law that a vendor's declaration after he has sold an article of personal property is inadmissible against the vendee to impeach the vendee's title to the property. The fact that the vendor is a thief, and has stolen the article, can add no greater force to his declaration, and the fact that the declaration is made in the presence of the vendee does not render the evidence competent."

In the case of *Milling* v. *Hillenbrand*, 156 Ill. 310, 40 N. E. 941, the Supreme Court of Illinois said: (p. 942 N. E.)

> "Counsel for the plaintiff sought to introduce evidence of statements by Gordon in relation to the ownership of the goods, made after the sale and delivery thereof to Hillenbrand, and in his absence, and without his assent; and, such evidence having been excluded by the court, its exclusion is assigned for error. It is a rule too familiar to require discussion that the statements of the vendor of goods, made after the sale, and out of the presence of the vendee, cannot be received to defeat the vendee's title."

In the case of *Illman* v. *Kruse*, 301 Ill. 408, 134 N. E.

107 (1922), the Supreme Court of Illinois said, at page 108 N. E.:

> "It is strongly argued by counsel for defendant in error that the above letter was written after the writer had sold and assigned all his interest in the land, and therefore it could not be admissible in evidence against defendant in error. * * * * We are of the opinion that under these authorities this letter was not admissible in evidence, and should not be considered, whatever its evidentiary force might be held to be."

In the case of *Dausch* v. *Barker, et al.*, 329 Ill. 410, 160 N. E. 765 (1928) the Supreme Court of Illinois said:

> "Statements or affidavits made by a grantor after he has parted with the title, are not admissible in evidence to impeach that title."

So far as we know, there have been no Illinois cases involving declarations of a bankrupt made after title has passed to the trustee in bankruptcy, probably because all bankruptcy matters are handled under the Federal statute and not under local statutes. However, a case involving an assignment for the benefit of creditors is that of *Myers* v. *Kinzie*, 26 Ill. 36, where the Court said at page 38:

> "No cases can be found in the books where it has been held that the statements of an assignor of property assigned to trustees for the benefit of his creditors made after the execution of the assignment were legal evidence against the assignees. *There would be no security in titles if they were.*" (Emphasis added.)

The general law on this question is to the effect that statements of a bankrupt made after his bankruptcy and after the property has vested in the trustee in bankruptcy do not bind his estate so as to be admissible against the trustee in bankruptcy in an action brought by him as trustee, or in an action in reclamation brought against the trustee. 6 *American Jurisprudence* page 1265, section 1192;

53 A.L.R. 650; 20 *American Jurisprudence* page 518, section 604; *M'Iver v. Kyger,* 3 Wheat. U.S. 53; *Whitmore* v. *Murdock,* 29 Fed. Cases No. 17,509; *In Re Haynsworth,* 34 Fed. 2d 334; *Myers* v. *Kinzie,* 26 Ill. 36.

The only time so far as we can find, that this question has been passed upon by the United States Supreme Court was in the case of *M'Iver* v. *Kyger,* 3 Wheat. U. S. 53. The opinion in this case was written by Chief Justice Marshall. This was an action for specific performance of a contract for the exchange of land. Kyger deeded a tract to one Watson, the bankrupt, but at the time the alleged agents of the parties made the evaluation of the tracts Kyger was to receive, Watson had become bankrupt. Kyger demanded a deed, and Watson excused himself on account of his bankruptcy, but executed a release which recited the agreement between the parties, the valuation of the land, and that a deed for the land had been executed by him and was in the hands of his assignee in bankruptcy. The lower court decreed a conveyance, but the Supreme Court reversed that decision. The defendant trustee (assignee) in bankruptcy denied the authority of the agents to make the valuation, and no proof was offered of this authority. The Court went on to say, at page 57: "And the recitals of the deed of release executed by Watson after he became a bankrupt are not evidence."

This matter was further reaffirmed in the case of *Whitmore* v. *Murdock,* 29 Fed. Cases No. 17,509. The court held that the statement of the bankrupt made after his bankruptcy and after the property had vested in his assignee in bankruptcy was inadmissible. The Court said at page 923: "After that he cannot be a witness or his confessions be competent to affect the previous title."

The case of *In Re Haynsworth,* 34 Fed. 2d 334, involved

a case where certain notes were listed as obligations of the bankrupts in their schedules in bankruptcy, with a statement that these notes had been assumed by the firm. The Court held that this *ex parte* statement without the right of cross examination was not binding on the trustee for the other creditors.

Leaving aside the question of the admission of the bankrupt after title has vested in his trustee, a number of Federal cases have squarely held that affidavits are *ex parte* statements, inadmissible in evidence in the Federal Courts. *Columbia Casualty Co.* v. *Thomas,* 101 Fed. 2d 151; *Stevens* v. *Howells Sales Co.,* 16 Fed. 2d 805; *Vendetti* v. *U. S.,* 45 Fed. 2d 543; *United States Fidelity & G. Co.* v. *Commercial Nat. Bank,* 55 Fed. 2d 564; *Pandolfo* v. *U. S.,* 286 Fed. 8, certiorari denied 261 U.S. 621; *Karpathiou* v. *Schlotfeldt,* 106 Fed. 2d 928.

The case of *Columbia Casualty Co.* v. *Thomas,* 101 Fed. 2d 151 was an action by an automobile liability insurer for a declaratory judgment against the insured driver of the truck involved in the accident and the parties injured in the accident. The insurer offered the affidavit of the driver of the truck as to what he was doing in and with the truck before and at the time of the collision to substantiate the insured's non-liability under the policy. The Court said that if the admissions of the driver in this *ex parte* statement were binding upon the assured and those injured such policies would be of small value. The Court said on page 152:

> "For it is unfortunately true that *ex parte* affidavits which do not speak the truth are easily procurable, and are procured from willing persons who though they may not be corrupt may be ignorant and easily led. If to their effect against the affiant there is added by the rule invoked an effect against third persons such af-

fidavits will be at a premium and the race for them will be on."

In the above mentioned Columbia Casualty case, it would seem that the Court gave the most forcible reason for not accepting such affidavit, and which most certainly should apply to the instant case. Here the Bankrupt had borrowed money from Jaffke, with the first borrowing being admittedly for the purpose of paying on the turn-over order, with the knowledge and consent of the Petitioner, who knew that the Bankrupt had been found to have the sum of at least $250,000.00 in assets in his possession or under his control. Petitioner admitted that he had been defrauded of the sum of $11,300.00 prior to the bankruptcy, which was still due and owing to him, and yet, he continued thereafter to be the friend of the Bankrupt, taking his wife to jail to visit with him, carrying the Bankrupt back and forth at the trial at which the Bankrupt was convicted of concealing the assets, without any compensation for his services, all after he claims he was defrauded. The Petitioner, himself, had the affidavit prepared and sent over to the jail to obtain the signature of the Bankrupt, all of which creates such an atmosphere that can lead only to a conclusion that the Petitioner was engaged in activities with the Bankrupt, trying to thwart the legal duty of the Trustee to collect the $250,000.00 which was imposed upon him by a Court order, after he had either failed to make a profit in the business venture with the Bankrupt, or to share in concealed assets. Then he conspires with the Bankrupt to obtain an affidavit which will give him his money back in preference to other creditors.

The Petitioner has posed a very difficult problem in his brief for the Respondent to answer each and every one of the allegations which have been made. For example, he continues to refer to Exhibit 29, which was stricken by

the trial court, particularly on page 38 in the footnote, which is taken from that same Exhibit, without mentioning such fact. We can only answer such allegations by also referring to that Exhibit, although we still contend that it was not then, and is not now, admissible as evidence. That transcript shows that neither the Trustee nor his attorney were present at the time of that *ex parte* proceeding in chambers. It is also significant to note that the Bankrupt did not pay anything on the turn-over order after this *ex parte* hearing on March 11, 1952. So, regardless of what may have been said or done at that hearing, the Trustee could not in any way be charged with notice because he was not present and further, because he did not receive any money thereafter. However, it is significant to note that the Bankrupt did not make any attempt to purge himself of contempt at that time, because of any inability not to make good on the turn-over order, or that he could not possibly comply with the same, but did assure the Court that if he was released from prison he could pay the turn-over order in full within a matter of 3½ days. This was verified by his attorney, Mr. William Giffin, who was then the Bankrupt's attorney, and is now representing the Petitioner Jaffke in this proceeding, when he said to the Court:

> "I don't think there is any question but what he will have the money and clear up all features of the transaction." (R. 209.)

The record is barren of any activity thereafter, except that the Bankrupt, in February of 1953, was convicted for concealment of assets by a Federal Court jury. It is evident that the affidavit which was supposedly executed on August 1, 1952, several months after this *ex parte* proceeding, and prior to his trial for concealment of assets, was executed at a time when he needed Jaffke as a witness to testify in his behalf at said trial.

Jaffke testified that he prepared the affidavit, but Attorney Heinze, who took the affidavit into the jail, had just come from Attorney Giffin's office, where he had met with Mrs. Knetzer to discuss whether or not he would represent Knetzer.

On page 22 and 23, Petitioner says that this affidavit was a declaration against the interests of the Bankrupt. The Bankrupt had already signed receipts and notes, which he gave to the Petitioner, which show on their face that they represented moneys borrowed from the Petitioner. The affidavit, itself, states that the Bankrupt "borrowed" the money from Petitioner, but it does not state for what purpose the money was borrowed, nor does it show on its face any reason why it would be wrong for the Bankrupt to turn that money over to the Trustee, especially in view of the fact that the Petitioner had already testified that part of the money was given by him to the Bankrupt for the express purpose of turning the money over to the Trustee. Therefore, Petitioner's statement that by the affidavit the Bankrupt admitted that he had improperly diverted a portion of the funds obtained from the Petitioner, to the Respondent, is not a correct statement, because that does not show on the face of the affidavit.

Of course, if this were only a proceeding between the Petitioner and the Bankrupt, there is no question but what it would be admissible as an acknowledgment of a debt which might be due from the Bankrupt to the Petitioner. However, as we have previously pointed out, this is not such an admission which can be proven against the Trustee by an *ex parte* affidavit.

III. A trustee in bankruptcy does not have a duty to investigate the source of payments made to him in compliance with a turn-over order.

Beginning at page 27 of his brief, Petitioner devotes the remaining 12 pages in an attempt to castigate the Trustee for what he claims is his failure to do his duty. He does not discuss the necessary requirements of the evidence required to prove a constructive trust and the tracing of funds and other related matters, which are necessary to a final disposition of this case, but it appears that he tries to obscure these issues by making it appear that the Trustee was neglectful in his official duties.

It is understandable that the Trustee had a tremendous job on his hands to try to unravel the affairs of this multi-million dollar bankruptcy. It is no secret that the Bankrupt was involved in a tremendous fraudulent scheme, by which he took in many millions of dollars on promises to deliver cars and trucks. Of course, he did deliver many cars and refunded a substantial amount of money to his creditors before the bankruptcy. However, after the Trustee assumed his duties and was able to find his way through the maze of records and other evidence available, and after the completion of an audit on the affairs of the Bankrupt, he filed his petition for a turn-over order and, after the presenting of evidence, the Court ordered the Bankrupt to turn over the sum of $250,000.00, which the Court found that he had in his possession or under his control. The order itself recites that evidence was presented on this matter.

It is unfortunate that under our laws and procedures the F.B.I. cannot be compelled to testify as to all of this activity, nor could the Trustee divulge all of his dealings with the F.B.I., but I think it can reasonably be assumed that there was perfect cooperation between him and the F.B.I. during all of the periods involved in this matter. The Court sustained an objection when the Trustee was

asked about his activities with the Federal Bureau of Investigation. (R. 93.)

The Trustee was compelled to go after the Bankrupt with every means at his command, to collect the sum of $250,000.00.

It is also very obvious that if the Bankrupt had walked into the Trustee's office and said, "Here is money that belongs to you that I have been holding out.", he would have automatically been guilty of concealing assets and could have been prosecuted for such activity, particularly after he did not comply with the turn-over order immediately upon its execution. It is only natural to assume that he would resort to devious methods of having these payments made by and through third parties, to make it appear as loans, in order to possibly have an alibi. However, the end result was the same, inasmuch as he was convicted of concealment of assets. That, in itself, should be proof that all of these devious methods of the Bankrupt were of no avail because, eventually, justice caught up with him and he was convicted. If, as Petitioner would have this Court believe, all of the Bankrupt's activities were confined to fraudulently obtaining money from other persons, without having any money concealed, then perhaps the United States Department of Justice committed an inequity by convicting him for concealment of assets.

Petitioner makes mention of the fact that the Trustee sat through creditors meetings wherein the Bankrupt was interrogated as to where he was getting money to live high, wide and handsome, after the bankruptcy, and different explanations were given, such as borrowing money from friends. Naturally, this could only be taken with a grain of salt in view of the fact that after handling millions of dollars he should and did have funds on hand at the time of bankruptcy, as found by the Court.

It is fundamental that the Trustee succeeds to all of the right, title and interest of the Bankrupt in both personal and real property. Although after a diligent search we find no case exactly in point, we do believe that the same principle would apply where the Court enters a turn-over order finding that the Bankrupt is withholding assets belonging to his Trustee; that the title would pass when the order became final. Therefore, the Bankrupt is merely handing over to the Trustee personal property to which title passed as of the date the order became final.

The case of *Avery* v. *Cleary*, 132 U. S. 604, cited by Petitioner, is not in point in connection with this matter, because there the trustee waited several years before making an inquiry as to whether the bankrupt had any life insurance and in the face of a two year statute of limitations filed a suit to recover on policies which had already been paid, claiming that the limitation should not apply to him because he did not have notice. It would seem the Court rightfully held that he was not entitled to recover; that the two year limitation applied to him because he had not made a diligent inquiry as to the assets of the bankrupt in connection with life insurance policies held by the bankrupt.

Likewise, the case of *Zartman* v. *First Nat. Bank*, 216 U.S. 134, is not applicable to the instant case, because in that case the Court merely held that a contract could be reformed where there had been a mutual mistake in preparing it. The Bankrupt had owned the property prior to the bankruptcy and the Trustee merely took title subject to the same equity as the Bankrupt had.

No one can quarrel with the law as laid down by this Court in the case of *Maggio* v. *Zeitz*, 333 U. S. 56, because there the bankrupt came in upon a petition to be purged

of contempt on the theory that he could no longer comply with the turn-over order, which the Court found to be a fact. But we do not have that situation in the instant case, because the Bankrupt never established that he should be purged of contempt because of his inability to comply with the turn-over order.

If there had not been any turn-over order, then we can concede that the Trustee would have been under a duty to ascertain from what source he might acquire properties or money from the Bankrupt, not listed as assets by the Bankrupt, but which might come to him voluntarily from the Bankrupt, as after-acquired property, but in the instant case that is not the situation because of the turn-over order.

On page 32, under Point III-C, Petitioner advances an argument that we do not understand. He says that the Trustee was under a duty to ascertain whether or not the moneys obtained on the turn-over order should have gone to the bankrupt estate of Robert L. Knetzer or to the bankrupt estate of the Knetzer Motor Sales Company. That matter was settled by the District Court on July 11, 1949, when he entered the turn-over order, and he found in that order that the bankrupt estate of Knetzer Motor Sales Company was not entitled to any turn-over order, that any moneys received on the turn-over order would go to creditors of the bankrupt estate of Robert L. Knetzer as an individual. (R. 144.)

On pages 33 and 34 of his brief, Petitioner blows both hot and cold. He first says that the Respondent had knowledge of sufficient facts to put him on notice that the Bankrupt was not paying in concealed assets, and in the same paragraph, says that the Respondent must have had, at minimum, reason to believe that the Bankrupt had con-

cealed assets and was a person not to be trusted. It is true that the Respondent had knowledge of the Bankrupt's fraudulent activities before the bankruptcy, but it is also true that the Petitioner had the same knowledge, as he so testified.

Petitioner states that the Respondent heard testimony of third parties and the Bankrupt, under oath, that the Bankrupt had been borrowing from third parties.

He refers to pages 38 and 39 of the Record, which merely contain statements by Mr. Griffin, the attorney, and are not evidence in this matter. He refers to the hearing of March 11, 1952, which is Petitioner's Exhibit 29 (R. 204), which was stricken by the trial court, but which shows on its face that the Trustee was not present, nor was his attorney. The date of April, 1950 definitely is not in evidence anywhere in the record. On page 84 of the record, mentioned by the Petitioner, it does show that a man by the name of Rhodes did make some payments for and on behalf of Knetzer, but the Court sustained objections as to questions as to any creditor's meeting at which the matter of loans were mentioned, and there was never any answer given by the Trustee, and the trial court said:

> "I can't see where that is material at all, whether somebody else may or may not have loaned anything to him. The rumors and stories going around would lead a man to believe anything."

Petitioner continuously makes the statement that the Trustee knew that the Bankrupt was out of jail and not in the custody of the Marshal. The Trustee testified that he made a distinction between actual confinement and technical confinement and that he did not know where the Marshal was on the occasions that the Bankrupt came into his private office. However, the Petitioner starts out his

brief, on page 4, by stating that the Bankrupt was permitted to leave jail on different occasions in the custody of the U. S. Marshal. Judge Briggle, in connection with Petitioner's Exhibit 29 (R. 204), stated that the Bankrupt would have to pay the expenses of the Marshal, who had been accompanying him on his trips, to the extent of some $10,000.00. That same exhibit shows the following:

> "Court: You must remember you represented to this Court on various occasions that you had the ability to comply with the turn-over order if released for a short time from the city prison and you have on numerous occasions been permitted to go in the custody of the Marshal and you have never lived up to the promises in full. That's true, isn't it? (fol. 211). Mr. Knetzer: "Yes, it is." (R. 106.) . . .
>
> "The Court: How long were you out with the Marshal since you were last released, do you remember? Mr. Knetzer: March, your Honor, last March. Court: You haven't been out all of that time? Mr. Knetzer: Yes, I have, your Honor. Court: You were out in the custody of the Marshal since March, 1951." (R. 211.)

Surely, this is not proof of any failure of duty on the part of the Trustee for, as the trial court pointed out, (R. 86) the Bankrupt was released from jail on the Court's order.

In the footnote at the bottom of page 34 Petitioner resorts to what might be regarded as scandalous statements, when he implies that the Trustee did not fulfill his duties in reporting violations of the bankruptcy laws to the United States Attorney. It is true that the Trustee did not testify as to relating all of his activities to the various authorities concerned with criminal prosecution, but it stands to reason that he did fulfill all of those duties, particularly in testifying before Grand Juries, as shown by the

record itself, and that he was constantly in touch with the Court, advising him as to what progress had been made on the turn-over order. Certainly, Petitioner cannot disclaim his own offer of evidence being Exhibit 29, which shows that the District Attorney had full knowledge of the amount of money which the Bankrupt had paid to his Trustee in the total sum of $170,000.00.

The Petitioner has the burden of proving his case in this matter and the fact that the Trustee did not describe all of his activities in detail, certainly is not proof that he did not so cooperate with all of the necessary authorities and do everything within his power to efficiently administer the bankrupt estates.

IV. Petitioner's allegation that the Respondent may not profit from his failure to make the necessary inquiry demanded by the circumstances of this case is without merit.

We have no quarrel with any of the cases cited on pages 38, 39 of Petitioner's brief. However, we wish to point out that these cases are not in point in connection with the instant case. Most of these cases refer to the operation of a business after bankruptcy, by an officer of the court, who failed to pay the sales tax, or withholding tax, or other tax money which were expressly impressed with a trust by virtue of statutes. Therefore, it naturally follows that the court could not permit, either a debtor in possession or a trustee in bankruptcy, to conduct a business under its orders and commingle funds contrary to a statute which impressed them with a trust the moment they were taken in by such individuals. Surely we do not have a similar situation here where a Trustee is collecting money under a turn-over order.

On pages 36 and 37, Petitioner argues with the decision of the Circuit Court of Appeals and says that its analysis of the evidence is incorrect. In doing this, Petitioner refers to matters which are not in the record.

The following chart, we believe, is a pretty clear picture as to the transactions involved, and is taken from the record and is what was used by the Circuit Court of Appeals in reaching the conclusion that it did.

Riley testified that he paid Knetzer as follows:		Jaffke testified that he paid Knetzer as follows:		Petty testified that he paid Knetzer as follows:	
6-28-50	250	12-7-50	6,100	4-14-51	5,000
6-30-50	1,000	12-13-50	12,500	4-29-51	7,500
7-2-50	600	12-18-50	7,500	5-4-51	8,500
7-18-50	6,000	12-21-50	9,000	5-10-51	8,000
7-27-50	9,000	1-3-51	6,000	5-28-51	14,500
8-2-50	200	1-8-51	1,000	6-51	500
8-10-50	8,000	3-14-51	520		
8-15-50	2,208	5-21-51	260		$ 44,000
9-12-50	2,831	Aug. 51	300		
9-15-50	2,300	Oct. 51	2,000		
		Oct. 22, 51	2,800		
	$ 32,389				
			$ 47,980		

It was stipulated that Gerald Sammons paid to Knetzer between October 1, 1951, and February 1, 1952, the sum of $101,550.00.

The Trustee was called as an adverse witness by the Petitioner and asked about the dates when he received monies on the turn-over order. It must be remembered that his interrogation was limited to monies received between

October 19, 1950 and November 1951 (R. 87.) The dates, by whom paid and to whom, and the amounts are as follows: (R. 77-87)

	Monies paid direct to	
Dec. 8, 1950	G. W. Horsley	5,000
Dec. 13, 1950	Currency from Robert L. Knetzer to Dunham	3,500
Dec. 22, 1950	Knetzer paid to Horsley	1,500
Jan. 1951	No payments	
Feb. 1951	No payments	
Mar. 1951	No payments	
Apr. 9, 1951	Knetzer paid to Horsley	5,000
Apr. 14, 1951	Attorney Cohn paid to Dunham	5,000
Apr. 19, 1951	" " " " "	5,000
Apr. 23, 1951	" " " " "	5,000
May 1, 1951	" " " " "	5,000
May 7, 1951	" " " " "	5,000
May 10, 1951	" " " " "	5,000
May 21, 1951	" " " " "	5,923.72
May 24, 1951	" " " " "	5,000
May 29, 1951	" " " " "	5,000
June 4, 1951	" " " " "	5,000
Oct. 11, 1951	" " " " "	5,000
Oct. 21, 1951	" " " " "	5,000
Nov. 13, 1951	Rex Rhodes paid to Dunham	1,000
Nov. 14, 1951	" " " " "	1,000
Nov. 15, 1951	" " " " "	1,000
Nov. 16, 1951	" " " " "	1,000
		$ 79,923.72

• • •

Thus, it is apparent, from the foregoing, that Jaffke testified that he gave to Knetzer the sum of $42,100.00 dur-

ing the period from December 7, 1950 through January 8, 1951. However, the Trustee received on the turn-over order, either from Knetzer or anyone for and on his behalf, during that same period of time, only the sum of $10,000.00. It is further significant to note that the Petitioner testified that he gave to Knetzer $6,100.00 and knew that it was for the purpose of being applied on the turn-over order. It is further significant that during the months of January, February and March, the Trustee did not receive any payments on the turn-over order. During the period from January 8, 1951 through October, 1951, Jaffke testified that he advanced to the Bankrupt only the sum of $1,080.00. Yet, during that same period of time, a man by the name of Petty testified that he gave to Knetzer the sum of $44,000.00, and it is further significant that, beginning on April 9th, Knetzer paid $5,000.00 to the Trustee and thereafter Attorney Cohn paid to the Trustee several sums of money, which, up to November 1st, totaled $65,923.72.

Thus, the Circuit Court of Appeals properly analyzed this situation in its opinion when it said:

> "The total amount paid to Knetzer by these four men was $225,919.00. Of this amount Knetzer paid to the Trustee during the period here in question only $79,923.00. It is evident, therefore, that $145,996.00 of the amount Knetzer received from these four men was not paid over to the Trustee."

The Court then goes on to analyze the exact periods of payment, matching them up with the dates when Jaffke testified that he gave Knetzer money, and finds that the payments to the Trustee could have been made by any one of the men.

The most significant fact is that Attorney Cohn was called as a witness by the Petitioner, but he does not shed

any light whatsoever upon the tracing of the funds. His only statement was that he paid the money to the Trustee and part of it came from the Bankrupt and part of it came from other persons, whom he did not identify. He, therefore, in effect disproved Petitioner's theory because he did not testify that the Petitioner ever gave him any money and that although the Petitioner was in his office one time in the company of the Bankrupt, it was not on an occasion when the Bankrupt gave him any money.

In fact, Attorney Cohn testified that during the period, April 14, 1951 to November, 1951, he paid approximately $70,000.00 to the Trustee and could only say that more of it was paid to him by the Bankrupt than any other person. Even if we assume that $35,000.00 of it was paid to him, it is less than the $44,000.00 which Knetzer received from Petty during that same period of time, a time during which Jaffke testified that he did not pay anything to the Bankrupt, except for a small sum during the summer which amounted to approximately $1,000.00. Therefore, if Petitioner is relying upon inferences, then his own witness, by inference has proved that it was not his funds that came into the hands of the Trustee but the funds of Clint Petty or someone else. (R. 134-135.)

V. In a reclamation proceeding the burden of tracing funds is upon the Petitioner, because the possession of property by the Trustee raises a presumption of ownership and the claimant must overcome this presumption by clear, convincing and unequivocal evidence.

Petitioner has, by innuendo, tried to say that the burden is upon the Trustee in this matter. He has not cited any cases to support his theory. On the other hand, all of the case law of the State of Illinois and of the Federal Courts has been to the contrary.

In Volume 5A, Remington on Bankruptcy, 1950 Edition, Section 2480, pages 291, 292 this brief summary of the law is set forth, citing many cases:

> "*Burden of Proof and presumptions.*—In all reclamation proceedings the burden of proof may be said to be on the petitioner both to make out his rights and to identify the property or funds which he seeks to recover among the effects of the bankrupt. Possession of property of itself raises a presumption of ownership, and the reclaimant must accordingly overcome this presumption. It is well settled that the reclaimant has the burden of showing that his property came into the bankrupt's possession and was still there in the same, or an identifiable transmuted form, when the bankruptcy petition was filed. Nor is he excused from sustaining the burden of proof resting upon him by the fact that account books of the bankrupt have been accidentally lost. Even the reclaimant's uncontradicted testimony need not be accepted as true, if inherently incredible."

Again, in this same Volume, in Section 2493, Remington says:

> "Where fraud is charged, strict proof is required." (Citing many cases.)

The Petitioner has the burden of proving that the Trustee holds the funds given by Petitioner to the Bankrupt. In other words, he must prove by clear and convincing evidence that he gave money to the Bankrupt and that such money was given by the Bankrupt to the Trustee. Circumstantial evidence is not sufficient, but the evidence must be strong. The Trustee contends that there is NO evidence in this case.

In the case of *Schuyler* v. *Littlefield*, 232 U.S. 707, p. 713, Brown & Co. obtained 300 shares of Interborough stock from Schuyler and others on false representations of sol-

vency. The appellants contended among other things that their money in the amount of $9,600.00 had been traced by the evidence into stocks which had subsequently come into the hands of the trustee in bankrupty.

The Court of Appeals held that the trust fund had not been traced into the hands of the trustee and dismissed the complaint.

The U. S. Supreme Court affirmed the Circuit Court of Appeals and said:

> "It would serve no useful purpose to make a detailed statement of the testimony. The evidence has been fully discussed by the Court of Appeals (193 Fed. Rep. 24-33) in considering this claim of appellants along with that of several other parties seeking, on somewhat similar facts, to trace trust funds into the bank and thence into collateral which ultimately came into the hands of the Trustee. All these claims were disallowed because of the failure to make the requisite proof. Our investigation of the facts leads us to the same conclusion so far as concerns the appellants' claim. They were practically asserting title to $9600 said to have been traced into stock in the possession of the Trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock their claim must fail. If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the Trustee, who represents all of the creditors of Brown & Co., some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund."

In the case of *In Re Harigan Supply Co.*, 2 Fed. 2d 791, decided by the 8th Circuit Court of Appeals in 1924, the court said at page 792:

"Accepting for the purposes of this opinion and decision but not deciding that the funds in dispute are trust funds if proper identity thereof can be shown in possession of the trustee, we examine this matter of identity. That these funds went into the bankrupt business is not questioned, but that is not enough. Such funds must be traced directly into money or property coming into the hands of the trustee. . . . . The proof here fails to trace these trust funds beyond entry, at various times and in various amounts into the general business of the bankrupt. It shows no direct connection between such funds and the property coming to the trustee."

To the same effect see *Board of Commissioners* v. *Strawn*, 157 Fed. 49, 84 CCA 553; also *John Deere Plow Co.* v. *McDavid, CCA* 8th, 1905, 137 Fed. 802; *In Re A. D. Matthews & Sons*, 238 Fed. 785.

We find no case contrary to the established principles that the Petitioner must trace the funds by clear and convincing evidence, and that conjecture, surmise and circumstantial evidence will not suffice.

To begin with, the Petitioner knew that the Bankrupt had committed a giant hoax and fraud on the public before he went bankrupt, even to the extent of taking some of Petitioner's money which had never been paid. The Bankrupt was under a turn-over order to pay $250,000.00 to the Trustee, all of which was known to the Petitioner. In fact the Petitioner says that the first money given to the Bankrupt by the Petitioner was for the purpose of paying on this turn-over order to keep him out of jail. Petitioner admits this, but now he comes into court and says he wants his money back. Is this court to be asked to allow an individual to knowingly advance money to a bankrupt who is concealing assets, while in contempt of court, to keep the bankrupt out of jail and thus engage in a

business venture with him, and then later ask to have that money repaid to him? We think not.

VI. Before the Petitioner could recover in this matter it was incumbent upon him to establish a constructive trust by sustaining his burden of proof with evidence which was so clear and convincing, and so strong, unequivocal and unmistakable as to lead to but one conclusion.

The trial court found, as a finding of fact, that the Bankrupt had obtained money from the Petitioner by fraud and misrepresentation. (R. 166.)

As we have previously pointed out, the Circuit Court of Appeals for the Seventh Circuit found that all of the Bankrupt's operations had been fraudulent, even before bankruptcy, but that Petitioner's proof that he had been so defrauded by Knetzer was not enough to establish the preference he sought over the other creditors. Thus, in effect, the Circuit Court of Appeals found that the Petitioner had failed to prove his theory of a constructive trust.

The Seventh Circuit Court of Appeals has followed the Illinois law in the matter of constructive trusts, and we believe that we can safely say that it is the well established law that before a constructive trust is raised, a petitioner must prove fraud by proof that is clear and convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion. *Chain O'Mines* v. *United Gilpin Corporation*, 109 F(2d) 617, CCA 7th 1940 cert. den. 61 S. Ct. 14, 311 U.S. 659. In that case this Court said at page 622:

> "Not unmindful of the rule which requires affirmance of the decree where circumstantial evidence exists to support it, we are also under the obligation to study the evidence and ascertain whether it is of the quantum and persuasiveness required by the law of Illinois

quoted above. When we find the record consists, as here, largely of documentary proof, the duty to give it our construction instead of accepting the views of the trial court, is clear and cannot be avoided. *Uihlein* v. *General Electric Co.*, 7 Cir. 47 F(2d) 997."

The Illinois law which the Court referred to in this opinion and which the Court likewise set forth at page 622 was to the effect:

> "The rule of the Illinois Supreme Court, stated in *Rubin* v. *Midlinsky*, 321 Ill. 436, 152 N.E. 217, 219 is that a constructive trust will not be imposed except where the proof of fraud is 'clear and convincing, and so strong, unequivocal and unmistakable as to lead to but one conclusion. . . . If the explanation of the evidence may be made upon theories other than the existence of a constructive trust, such evidence is not sufficient to support a decree declaring and enforcing such trust'."

To the same effect the law is restated in the cases of *Grand Trunk Western R. Co.* v. *Chicago & Western Indiana R. Co.*, 131 F. (2d) 215; *Jacoby* v. *Shell Oil Co.*, 196 F(2d) 855; *National Waste Co.* v. *Spring Packing Corp.*, 200 F (2d) 14, cert. den. 345 U.S. 509.

In addition to the quantum and type of proof of the elements of a constructive trust under the Illinois law consist of the same elements as are necessary to be stated in an action at law for fraud and deceit. *Johnston* v. *Shockey*, 335 Ill. 363. As was stated in the case of *Roda* v. *Berko*, 401 Ill. 335, 81 N.E. 2d 912:

> "A misrepresentation, in order to constitute fraud which will warrant a court of equity in rescinding a contract, must contain the following elements: It must be a representation in the form of a statement of a material fact, made for the purpose of inducing the other party to act. It must be false and known by the party making it to be false, or not actually believed

by him on reasonable grounds, to be true. The party to whom it is made must be ignorant of its falsity, must reasonably believe it to be true, must act thereon to his damage, and in so acting must rely upon the truth of the statement. *Bouxseim* v. *First Nat. Bank of Granville,* 292 Ill. 500, 127 N.E. 133; *Krankowski* v. *Knapp,* 268 Ill. 183, 108 N.E. 1006; *Gillespie* v. *Fulton Oil and Gas Co.,* 236 Ill. 188, 86 N.E. 219; *Prentice* v. *Crane,* 234 Ill. 302, 84 N.E. 916."

Before considering the facts in this matter and laying them down side by side with these yardsticks, may we examine two more principles of Illinois law which are applicable. First, it was said in the case of *Morel* v. *Masalski,* 338 Ill. 41, 164 N.E. 205:—

"These general rules, however, have some limitations. In all cases where it is sought to hold one liable for false representations, the question necessarily arises whether, under all the circumstances, the party seeking relief had a right to rely upon the representations made. In determining this question the representations must be viewed in the light of all the facts of which the party injured had actual knowledge and also such as he might have availed himself or by the exercise of ordinary prudence. If it appears that there were facts and circumstances present at the time the false representations were made sufficient to put the injured party upon his guard or to cast suspicion upon their truth, and he neglected to avail himself of the warning thus given, he will not afterwards be heard to complain, for the reason that his own conduct contributed to his injury. Ordinarily one is not liable for false representations respecting a mere question of law. *Dillman* v. *Nadlehoffer,* 119 Ill. 567, 7 N.E. 88. A person in possession of his mental faculties is not justified in relying upon representations made, when he has ample opportunity to ascertain the truth of the representations before he acts. When he is offered the opportunity of knowing the truth of the representa-

tions, he is chargeable with knowledge. If he does not avail himself of the means of knowledge open to him, he cannot be heard to say he was deceived by the misrepresentations. *Dickinson* v. *Dickinson,* 305 Ill. 521, 137 N.E. 468; *Hustad* v. *Cerny,* 321 Ill. 354, 151 N.E. 871. It is only in cases where the parties do not have equal knowledge or means of knowledge of the facts represented that equity will afford relief on the ground of fraud and misrepresentation. *Johnson* v. *Miller,* 299 Ill. 276, 132 N.E. 490."

To the same effect, see *Bundesen* v. *Lewis,* 368 Ill. 623, 15 N.E. 2d 520; and *Dickinson* v. *Dickinson,* 305 Ill. 521, 137 N.E. 468.

Secondly, the Illinois law requires a petitioner to come into Court with clean hands and requires his actions to have been such that his hands have been clean throughout the whole transaction. The Supreme Court of the State of Illinois in the case of *Rosenbaum et al.* v. *Huebner et al.,* 277 Ill. 360, 115 N.E. 558, said:

"It is a well-settled doctrine that where a conveyance has been made for the purpose of hindering, delaying, or defrauding creditors of a grantor, or where anticipated danger of litigation or criminal prosecution has influenced the conveyance, equity will not interpose to restore to the grantor or his heirs the title to the property so conveyed."

Without detailing all of the facts in the instant case, most of which have been scattered throughout our brief, it would appear that the Petitioner did not act as a prudent man; that he was dealing with a man whose previous activities he had known to be fraudulent and yet he did not make inquiry of the officers of the corporation as to the activities of the corporation; that he knew about the turn-over order and even gave the Bankrupt money to pay upon the turn-over order; that he knew that the Bankrupt was en-

gaged in *sub rosa* activities by conducting businesses without having his name connected therewith; that he even cooperated with the Bankrupt to testify in his behalf on a trial for concealment of assets.

It is undisputed that Petitioner was a man of wide business experience, with adequate legal counsel who handled his matters for him, yet he purportedly invested money in a corporate deal, not for the purchase of stock but in order to get a percentage of the profits, which, of course, is contrary to his own exhibits which indicate that he loaned money for short periods of time to the Bankrupt as an individual, at a specified rate of interest, to be repaid on dates certain, without said instruments bearing any restriction upon the use of the money so borrowed, all of which is contrary to his oral statements.

Therefore, we can only conclude from all of the evidence in the record, including all of the inferences most favorable to the Petitioner, that he did not act as a prudent man would act under the circumstances, that he entered into a scheme with a Bankrupt who was operating a business while concealing assets and while in contempt of court, all of which was known to the Petitioner. We sincerely believe that the evidence in this case as to any fraud is not clear and convincing and unequivocal. Petitioner's own Exhibit shows on its face that he loaned the Bankrupt money for a short period of time. The only inference that can be drawn is that this loan was so the Bankrupt could have money to use in lieu of leading the Trustee to his concealed assets.

We, therefore, believe that under the holdings of this Court and the Supreme Court of the State of Illinois the Petitioner has failed to prove that money was obtained

from him by fraud and further that he has any right to recover under the theory of fraud.

VII. The Petitioner was not a competent witness in his own behalf in this proceeding, under the statutory law of Illinois.

In the Circuit Court of Appeals the Respondent urged this matter, but that Court rejected our theory that the Petitioner was not a competent witness. We have preserved our objection to his testimony by making objection at the proper time, when he was first offered as a witness in his own behalf. (R. 40.)

The Circuit Court of Appeals did not squarely hold whether or not the Illinois statute prohibited him from testifying, but based its rejection upon the proposition that it would appear that the Bankrupt, and his heirs after his death, did not apparently have any real interest in the outcome of the bankruptcy because there would be nothing left for either the Bankrupt or his heirs in view of the fact that the claims on file were much greater than the assets of the Bankrupt's estate. We do not believe that this statement of the Court is a correct statement of the applicable law of the State of Illinois.

We realize that by urging this matter upon this Court without having filed any cross-appeal, that some argument may be made that our position is inconsistent. However, we believe that our position falls squarely within the framework of the cases previously cited in this brief, that we can urge this point in support of the upholding of the judgment of the Circuit Court of Appeals, even though the Court rejected our argument, because to do so, does not in any way enlarge our rights.

It was stipulated that the Bankrupt died on August 26,

1953, prior to the hearing in this matter, and that he left him surviving a widow and two children.

Prior to the enactment of the Federal Rules of Civil Procedure there was a statute known as the *"Competency of Witnesses Act,"* 34 Stat. 618, R.S. Sec. 858, 28 USC 631, providing that the competency of a witness in the Federal Courts was to be determined by the laws of the State or territory in which the court was held. The Judicial Code Revision Act of 1948 repealed this Act and did not enact any Federal competency statute. Since the Competency of Witnesses Act which was in force prior to the Act of 1948, was applied to suits in equity, as well as actions at law, the law of the State in which the Federal Court is sitting is the criterion of competency under any of the alternatives of Rule 43 A of the Federal Rules of Civil Procedure. 5 *Moore Federal Practice*, Sec. 43.06, page 1330.31; *Collier on Bankruptcy*, 14th Edition, Vol. 2, Sec. 21.10, *Competency of Witness Other Than Spouse of Bankrupt; Wright* v. *Wilson*, 154 Fed. 2d 616, CCA 3rd 1946, Certiorari denied, 329 U.S. 743; *Potlatch Oil and Refining Co.* v. *Ohio Oil Co.*, 199 Fed. 2d 766, CCA 9th, 1952; *Lakeshore National Bank* v. *Bellance Aircraft Corp.*, 83 Fed. Supp. 795, affirmed 178 Fed. 2d 923, CCA 3, 1950.

This principle as to governing law is applicable to proceedings in bankruptcy as well as civil proceedings in Federal Court, by virtue of *Order No. 37 of the General Orders in Bankruptcy*, established by the Supreme Court of the United States on January 16, 1939, effective February 13, 1939.

Section 2, Chapter 51, Illinois Revised Statutes, Bar Association Edition, provides in part:

> "No party to any civil action, suit or proceeding, or person directly interested in the event thereof,

shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any habitual drunkard, or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, *or as guardian or trustee of any such heir, legatee or devisee....*" (Italics ours.)

(Certain exceptions are enumerated in this statute, none of which, however, is applicable in this proceeding.)

In this proceeding William C. Dunham is sued as Trustee for the bankrupt estate of Robert L. Knetzer, who is now deceased. It was established by evidence in this proceeding that Robert L. Knetzer died, leaving heirs to his personal estate. By virtue of the foregoing statute and by virtue of these facts Respondent contends that he is a protected party under the terms of Section 2, Chapter 51, Illinois Revised Statutes, Bar Association Edition.

In the case of *Rankin* v. *Cox,* 71 Fed. 2d 56, CCA 8th 1934, the Court, in holding that a bankrupt was incompetent to testify to relevant conversations and transactions with a deceased party in view of the bankrupt's direct, legal interest in the estate, said (page 61):

"As declared by this Court in *Burton Coal Company v. Franklin Coal Company,* 67 Fed. 2d 796, 801, 'In the normal administration of a bankrupt estate any surplus remaining in custody of the trustee should go to the bankrupt.' We see no reason to doubt that the right of the bankrupt to or of his estate that may remain after the bankruptcy administration is a right or a legal matter and necessarily results in his having a direct legal interest in the bankrupt estate within the language of the Nebraska statute. (Citations omitted) The bankrupt has also the right to make composition with those creditors (Sec. 12

> Bankruptcy Act UCCA Title 11 Sec. 30) and upon confirmation of a composition, the bankruptcy proceedings must be dismissed (Sec. 12e of the Act) (USCA Sec. 30(e)) leaving the bankrupt's title to his estate unimpaired by the bankruptcy proceedings. This right also is in the nature of a legal interest in the estate."

Although authority for such an obvious proposition is probably unnecessary, we feel that the above cited case clearly shows that the bankrupt retains an interest in his estate which would, by the law of intestate succession in the State of Illinois, descend to his heirs at law upon his death.

Although there are no Illinois cases dealing with the applicability of Chapter 51, Section 2, Illinois Revised Statutes, Bar Association Edition, to a trustee in bankruptcy of a deceased person as a protected party, there are a number of decisions dealing with similar statutes in other States holding that a trustee in bankruptcy is a protected party.

In the case of *In Re Shaw*, 109 Fed. 780, District Court for the Eastern District of Pennsylvania, 1901, one F. F. Kaufman filed a claim before a Referee in Bankruptcy. The bankrupt was dead and the Referee refused to consider the testimony of the claimant in support of the items of his account. On appeal to the District Court the action of the Referee was upheld, the District Court saying at page 780:

> "The Referee was right in refusing to consider the testimony of the claimant in support of the items of his account. The bankrupt was dead, and by virtue of Section 5, cl. (2) of the Pennsylvania Statute of 1887 (P.L. 158), the witness had become incompetent to testify upon this subject. Neither had he been made competent by virtue of Section 7 of the same statute.

The Trustee did not call him for cross examination upon the items of his claim; but for examination concerning a transfer of property made to him by the bankrupt within four months preceding the adjudication and while it may be true that this transfer was made in attempted satisfaction of the claimant's account, nevertheless the examination of the Trustee did not go into the items of the claim."

The Pennsylvania statute involved was *Section* 322, *Title* 28, *Purdon's Pennsylvania Statutes*, 1936. The statute at the time of the *In Re Shaw* case was not set out in the report, but there have been no material changes in the statute since the time of the *Shaw* case. The present statute reads:

". . . nor, where any party to a thing or contract in action is dead or has been a lunatic and his right thereto or therein has been passed, either by his own act or by the act of the law to a person on the record who represents his interest in the subject in controversy, shall any surviving or remaining partner, etc." (The statute continues, holding the surviving party incompetent and makes certain exceptions not here pertinent.)

In the case of *Ray* v. *Salisbury*, 134 N.Y. Supp. 733, 1911, a bill *quia timet* was brought by Ray against Salisbury as the Trustee in Bankruptcy of John H. Ray. The premises in question were owned by Ray, who was adjudicated a bankrupt and who was insane at the time the bill was filed. Within four months prior to the filing of the petition, Ray conveyed the premises to his son, the plaintiff. The plaintiff contended that Ray's wife advanced money to improve the property on the condition that a deed be made to her, but later modified the agreement to provide that the deed could be made to the plaintiff. The bill was dismissed on the ground that the conveyance was

an unlawful voidable preference. The Court said, at page 733:

> "But the only evidence as to the making of the original agreement was given by the plaintiff's mother and because of the fact that John H. Ray was insane at the time of the trial it seems to me that she is incompetent under Section 829 of the Code to give such testimony against the trustee of her husband. *Rosseau* v. *Russ*, 180 N.Y. 116, 72 N.E. 916. Under the authority of that case she is a person through whom plaintiff derives his interest in the property 'by assignment or otherwise' and forbidden to testify as to the transaction with her husband now insane."

In the case the Court applied a New York statute to the protection of the Trustee in Bankruptcy, although the particular statute was specifically for the protection of a committee appointed by law to represent the interests of an insane person, feeling that a trustee in bankruptcy would stand in the same position.

It must be emphasized that in none of these cases was there a statute involved which specifically mentioned a trustee in bankruptcy as a person protected by the statute.

There is, of course, a practical application to the so-called "Dead Man Statute", because a Respondent, such as in the instant case, is definitely at a great disadvantage in defending a case where his bankrupt is dead, and a petitioner can say almost anything without fear of contradiction. We sincerely believe that Petitioner was not a competent witness in his own behalf, and if his evidence is stricken, of course there is nothing in the record for his theory of the case whatsoever.

CONCLUSION

We respectfully submit that the ultimate judgment reached by the Circuit Court of Appeals was correct and that the judgment there entered for the Respondent was correct and should be affirmed by this Court.

Respectfully submitted,

G. W. HORSLEY
L. H. LENZ
408 East Adams Street
Springfield, Illinois
Attorneys for Respondent